No. ~~15378~~

United States
COURT OF APPEALS
for the Ninth Circuit

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' BRIEF

Appeal from the United States District Court for the District of Oregon.

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SUBJECT INDEX

SUBJECT INDEX (Cont.)

INDEX OF AUTHORITIES

Page

Cases

INDEX OF AUTHORITIES (Cont.)

INDEX OF AUTHORITIES (Cont.)

Texts

Annotations

Statutes

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JURISDICTIONAL STATEMENT

Jurisdiction of the court below was predicated on Title 18, USCA, Sec. 3231, and jurisdiction of this court is based upon Title 28, USCA, Sec. 1291. The federal indictment is found in the Transcript of Record, Volume I, No. 3, pages 10 to 21.

On February 4, 1957, an indictment was filed in the United States District Court for the District of Oregon (Tr. of Record No. III, pages 10 to 21) charging appellant's with violations of Section 371, Title 18, USC

(Conspiracy) in the first count, and violations of Sections 501 and 605, Title 47, USC (the wiretapping statutes), in the other eight counts.

A motion to dismiss and a motion to suppress were filed, argued, and testimony taken on the motion to suppress, and on April 12, 1957, the motion to dismiss was denied about 5:00 p.m. (M.S. 531).

On April 13th a civil injunction suit was filed by these defendants against the State officers participating in the State raid to enjoin them from testifying concerning the raid under the analogy of *Rea v. U. S.*, 350 U.S. 314. After hearing on the order to show cause, a temporary restraining order was issued by the State court so restraining them (Transcript of Proceedings, Volume I, pages 3 to 5). The trial below commenced on April 16th and the Court ordered the witnesses so restrained to testify under penalty of contempt of the Federal court and each of the State officers so ordered then gave testimony.

At the conclusion of the Government's case and upon motion of the appellants the trial court dismissed Counts III and IV of the indictment and overt acts numbered 1 and 2 of the indictment (Minute entry Tr. of Record, Vol. 1, No. 27, p. 105; see also, Tr. of Proceedings, Vol. XV, p. 2468). The appellants were each found guilty upon the seven counts submitted to the jury and appealed to this Court from the judgments and supplemental judgments of fines and imprisonment and costs assessed against each (Tr. of Record, Nos. 34, 35, 39 and 40, pp. 127 to 130, 140 and 141).

PRELIMINARY STATEMENT

Since the testimony of the Government's case in chief is found in 15 volumes extending over approximately 2,500 pages[1] and, in addition, there is one volume of the proceedings on defendants' motion for a continuance,[2] two volumes of over 500 pages of the proceedings and testimony upon defendants' motion to dismiss and motion to suppress the evidence,[3] and 240 pages of the transcript of record,[4] it is difficult to know when and where to present the "concise statement" of pertinent facts as required by the rules, in a manner best calculated to bring about clarity in presentation.

In order to facilitate clarity in this brief, we have prepared concise statements of pertinent facts under the various specifications of errors, particularly under the specification of error relating to the motion to suppress, at the outset of the specification of errors at the trial, and have included a brief narrative digest of all of the testimony taken on both the motion to suppress and the Government's case in chief at the trial in the Appendix with page references. (Preparation of such a digest necessarily involves some editorial judgment but we have attempted to include all inferences favorable to the Government's theory).

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[1] Which will hereinafter be cited as Transcript, or (Tr.).

[2] Which will hereinafter be cited as Continuance Transcript, or (C Tr.).

[3] Which will hereinafter be cited as Motion to Suppress, or (M.S.).

[4] Which will hereinafter be cited as Transcript of Record, or (Rec.).

We will first briefly review

THE STATE COURT PROCEEDINGS

About 5:30 p.m., May 17, 1955, a State of Oregon search warrant was issued by a Judge of the State District Court on the affidavit of the District Attorney for Multnomah County. That night the home of appellant Clark was broken into and searched pursuant to said search warrant and it is claimed that, among other things, five reels of electronic tape recordings were seized by the deputy sheriffs. On the 21st of May, 1955, a motion to suppress was filed and testimony taken with the matter being continued and further testimony being taken on the 22nd and the 23rd of May. On the 22nd of May, 1955, while the hearing on the motion was in progress, a state grand jury indicted the defendants on a charge of violating the state wiretapping statute. The State District Judge who issued the warrant, after hearing on the motion to suppress, allowed the motion, declared the search a nullity, but instead of ordering the tapes returned to defendant Clark, ordered them turned over to the Attorney General of the State of Oregon for use in the Attorney General's vice investigation. The Circuit Court of the State of Oregon heard a similar motion and after argument, and while under advisement by the Circuit Court of the State of Oregon, and on September 5, 1956, a federal search warrant was issued by the United States Commissioner for the District of Oregon based on an affidavit of an FBI agent and five reels of tape were seized by the Federal Government under said search warrant.

We believe that clarity will be served by this arrangement of material and hence we will now proceed with the specifications of error, commencing with the specification relating to the motion to dismiss the indictment. For the convenience of the Court, we note that the other statements of the pertinent facts are to be found at pages 30 to 51, and 83 to 93 of this brief.

SPECIFICATION OF ERROR NO. 1

The Court erred in denying defendants' motion to dismiss (or in the alternative) a motion to require the government to furnish a bill of particulars in certain instances.

SUMMARY OF INDICTMENT

First Count (Conspiracy) charges the Appellants conspired (Title 18, § 371 U.S.C.) in violation of Title 47, §§ 501 and 605 (the wiretap statute) to "intercept wire communications and divulge and publish the existence, contents, substance, purport, effect and meaning of said intercepted wire communications of others, without the authority of the senders of said communications . . ." The First Count alleged that it was further a part of the conspiracy:

a) That Defendants would have a recording device installed in a certain apartment, which recording device would be "connected to lines intercepting the telephone wires" of one Maloney in the adjoining apartment;

b) That defendant Elkins would employ defendant Clark to intercept the telephone conversations of Ma-

loney and others, and between others, carried on Maloney's telephone line, and record the same, without authority of the persons conversing over said telephone;

c) That said recordings would be "delivered to and possessed by defendants";

d) That defendants would play back the recordings, and defendant Elkins would divulge the existence, and contents of said intercepted conversations to "other persons";

The Conspiracy count alleged eight overt acts, the first two of which were withdrawn by the lower Court. The remaining six alleged that:

a) Defendant Elkins directed one Kane to rent an apartment and deliver the keys to defendant Elkins;

b) Defendants placed a recording device in said apartment;

c) Defendant Elkins went to the home of one William Langley and divulged to Langley the existence of said intercepted conversations and showed to Langley a written transcript of some of said intercepted conversations;

d) Defendant Elkins took to home of Janice Langley (wife of William) a recording machine and played it in her presence;

e) Defendant Elkins took a recording machine to the home of one Crosby and divulged the existence and published the contents of said intercepted communications to Crosby by playing recordings in Crosby's presence;

f) Defendant Clark possessed at his residence recording equipment, spools of tape and wire, for use thereon, and concealed tapes upon which were recorded said intercepted communications, said defendant Clark knowing that said tapes contained recordings of intercepted communications.

The indictment included also eight counts (II through IX) of alleged substantive violations of the wiretap statute (Sections 501 and 605 of Title 47, U.S.C.A.). Counts III and IV were withdrawn by the Court, leaving only six substantive counts. We feel that a summary in tabular form will adequately describe these counts, as follows:

COUNT NUMBER II

Description of alleged interception	Elkins and Clark "did knowingly, wilfully and unlawfully, . . . without authority of the senders, intercept . . .
Persons whose conversations were allegedly intercepted	"Wire communications between Langley and Maloney . . ."
Alleged divulger, publisher or user	"and divulge or cause to be divulged the existence of such . . ."
Persons to whom divulgence allegedly made	" . . . to Langley, Crosby and others . . ."

COUNT NUMBER V

Description of alleged interception	" . . . not being authorized by the senders . . ." Elkins and Clark "did knowingly, wilfully and unlawfully intercept . . ."

Persons whose conversations were allegedly intercepted	"wire communications between Maloney and Sheridan"
Alleged divulger, publisher or user	and Elkins "did thereafter divulge and caused to be divulged the existence," contents, etc."
Persons to whom divulgence allegedly made	" . . . to Langley and Crosby and to others . . ."
	" . . . and did use the same for the benefit of Elkins and others not entitled thereto."

COUNT NUMBER VI

Description of alleged interception	Elkins and Clark did "knowingly, wilfully and unlawfully intercept, . . . not being authorized by the senders . . ."
Persons whose conversations were allegedly intercepted	"A wire communication between Maloney and Langley . . ."
Alleged divulger, publisher or user	and Elkins, "having become acquainted with the contents, etc. thereof and knowing [the same to be] so obtained did thereafter unlawfully divulge and publish the existence, contents," etc.
Persons to whom divulgence allegedly made	" . . . to Mrs. Janice Langley and others"
	" . . . and use the same for the benefit of Elkins and other persons not entitled thereto."

COUNT NUMBER VII

Description of alleged interception	Elkins and Clark, "did, not being authorized by the sender, knowingly, wilfully and unlawfully intercept . . ."
Persons whose conversations were allegedly intercepted	"A wire communication between Maloney and Langley"
Alleged divulger, publisher or user	and Elkins, "did thereafter, having become acquainted with the contents, etc. thereof, and knowing that such information was so obtained, divulge and publish the existence, contents, etc."
Persons to whom divulgence allegedly made	" . . . to Langley and others . . ."
	"And did use the same for his own benefit and for the benefit of another not entitled thereto . . ."

COUNT NUMBER VIII

Description of alleged interception	Elkins and Clark, "did, without the consent of the senders, knowingly, wilfully and unlawfully intercept . . ."
Persons whose conversations were allegedly intercepted	"A wire communication between Maloney, Portland and McLaughlin in Seattle."
Alleged divulger, publisher or user	and Elkins, having become acquainted with the contents, etc., of the same, did divulge and publish the existence, contents, etc."

Persons to whom divulgence allegedly made	" . . . to Langley, knowing that such information was so obtained . . ." "and did use the same for his own benefit or for the benefit of another not entitled thereto . . ."

COUNT NUMBER IX

Description of alleged interception	Elkins and Clark, "did, knowingly, wilfully and unlawfully, without being authorized by the senders, intercept . . ."
Persons whose conversations were allegedly intercepted	" . . . a wire communication between Langley and Anderson . . ."
Alleged divulger, publisher or user	" . . . and did divulge and publish . . . the existence, contents, etc. of such intercepted communication . . ."
Persons to whom divulgence allegedly made	" . . . to Langley, and Crosby and others . . ."

We feel that it will be helpful to quote the wiretap statute, Title 47, § 605, U.S.C.A., emphasizing clauses 2 and 4, the relevant sections here, for purposes of contrast:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agents, or attorney, or to a person employed or authorized to forward such communication to its

destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the matter of a ship under whom he is serving, or in response to a subpoena issued by court of competent jurisdiction, or on demand of other lawful authority; *and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person;* and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereof; *and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . .*"

It will be seen therefore that the two relevant clauses of the section, clause 2 and clause 4 have the following effect:

Clause 2 makes it unlawful for one

a) to intercept *AND*

b) to divulge or publish.

Clause 4 makes it unlawful for one

a) who has received an intercepted communication (or who has become acquainted therewith), with knowledge of the interception

b) to divulge or publish, *OR*

c) to use the same for his or another's benefit.

Clauses 1 and 3, on the other hand, have nothing to do with interception, but rather with unauthorized divulgence or use by the receiver, or transmitter. This is an important distinction.

It is also important that clause 2, being phrased in the conjunctive, requires *two acts*—interception *AND* divulgence; clause 4 requires *two conditions*—reception or acquaintance with an intercepted communication, combined with divulgence or use.

Under clause 2, therefore, interception alone, or divulgence alone, is not a crime; both elements are necessary, plus, of course, the vital elements of wilfullness and knowledge (Sec. 501, Title 47).

Similarly, under clause 4, mere divulgence or use is not a crime. Such divulgence or use (in addition to being wilful and with knowledge) must be by one who receives or becomes acquainted with a communication intercepted in violation of clause 2, and who knows that it was so obtained. Likewise, mere reception or becoming acquainted, even knowing that it was an intercepted communication, is not enough under clause 4; a divulgence or use also is required to make out a crime. And this indictment, and the validity of the trial court's rulings on the motions to dismiss, must be considered in the light of the foregoing distinctions.

A. Objections of Clark as to Counts V, VI, VII and VIII.

The first point to be mentioned here, on behalf of defendant Clark alone, is that clearly Counts V to VIII, inclusive, allege an interception by both defendants Elkins and Clark, but each count alleges a subsequent divulgence or use by *defendant Elkins* alone.

As we have seen before, to constitute a crime, clause 2 clearly requires two acts done wilfully and knowingly: interception *and* divulgence. Similarly, clause 4 clearly requires a wilful and knowing receipt of or acquaintanceship with intercepted communications *and* a divulgence or use thereof.

Nowhere, in counts V, VI, VII and VIII, is there any allegation that defendant Clark did more than intercept. It would hardly seem to require any extended discussion that these counts were and are faulty as to Clark. Even if the proof should show that Clark was an aider and abettor of Elkins, as to the divulgence or use claimed by the indictment (which defendants of course do not admit), such could not cure the fatal defect in the allegations.

It would be a novel and unwarranted principle of law that a man may be convicted for a full crime when he is charged with only a half crime, under a statute prescribing the *two* essential elements of the crime.

When this objection was raised at the time Clark excepted to the Court's instructions, the court said:

> "I understand your position on it. I think there is a real serious question there." (Tr. 2530).

Nor can it be said that the Government did not know how to draw an indictment. Counts II and IX, for example, though otherwise defective, are not subject to the objection here made.

It is submitted, therefore, that the court clearly erred in not dismissing Counts V, VI, VII and VIII as to Clark, for reasons just given.

B. Objections to Counts II through IX, inclusive.

Defendant and each of them, timely moved that Counts II through IX, inclusive, be dismissed because they failed to comply with Rule 7(c) of the Federal Rules of Criminal Procedure in that each of the counts failed to set forth a "plain, concise and written statement of the essential facts constituting the offense charged" because none of these counts contained *any allegation whatsoever* as to the date or dates upon which the alleged divulgence or use of the allegedly intercepted wire communication took place. As we have seen before, this is a peculiar statute in that it requires two elements (interception plus divulgence) under clause 2 and two things (divulgence or use by one who receives or becomes acquainted) under clause 4. Since both elements are necessary and vital elements of the crime (and since wilfulness and knowledge are also strict requirements), these matters should be stated plainly, concisely and definitely, if Rule 7(c) F. R. Cr. P. is to mean anything. It will be noted that in each of counts 2 through 9, the government very carefully alleged the date of the alleged interception (five of the eight original substantive counts alleging a specific day of the month). But in none

of those counts, did the government allege a date of divulgence or use.

The purposes of an indictment are two-fold. First, the indictment serves to give fair notice to the accused of the essential facts of the offense charged with sufficient clarity to enable him to prepare his defense. Secondly, clarity and conciseness must exist in an indictment to enable the accused to plead a judgment, whether of acquittal or conviction, as a bar to a further prosecution. *Ornelas v. U. S.* (9th Cir. 1956), 236 F.2d 392; see *Mitchell v. U. S.* (10th Cir 1944), 143 F.2d 953; *Roberson v. U.S.* (5th Cir. 1956), 237 F.2d 536; and *Sutton v. U. S.* (5th Cir. 1946), 157 F.2d 661.

As Judge Yankwich said in *U. S. v. Young,* 113 F. Supp. 20 (affirmed 212 F.2d 236, certiorari denied, 347 U.S. 1015), " . . . facts must be stated and not conclusions of law alone, because a crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time and place and circumstances."

The defendants were thus deprived of fair notice of the essential facts, by failure of Counts II through IX to specify the date of alleged divulgence or use with the reasonable particularity required by Rule 7(c), and by essential notions of fairness. The lower court not only denied their motion to dismiss on this ground, it also denied their alternate motion for a bill of particulars as to these dates. We thus claim error in these rulings.

Furthermore, the crime being composed of the two acts, interception and divulgence, it would be absolutely impossible for these defendants later to plead judgment of conviction if it be sustained, or judgment of acquittal if this Court should reverse and order such a judgment, as a bar to a future prosecution. This is an acute matter in a two-element crime, for it is entirely conceivable that the government might some day charge these defendants with the same alleged interception and a *different* divulgence or use. In such event, there would be no way in which the defendants could plead either conviction or acquittal as a bar to such a prosecution. Thus in a wiretap matter, the government could repeatedly prosecute a man based upon a single alleged interception and repeated alleged divulgences and he would never know when he had been acquitted.

Tested by accepted rules, Counts II through IX of indictment are clearly insufficient either (1) to give fair notice to these defendants of the essential facts of the offense with sufficient clarity to prepare their defense or (2) to enable defendants to plead any judgment of acquittal or conviction as a bar to a future prosecution; we submit that the lower court erred in denying the motion to dismiss Counts II to IX.

Defendants moved, in the alternative, for a bill of particulars requiring the government to particularize the dates of alleged divulgence or alleged use.

The function of a bill of particulars is likewise twofold. First, it enables the defendant to prepare his defense, and secondly, it protects a defendant against

second prosecution of the same offense. *Norris v. U. S.* (5th Cir. 1946), 152 F.2d 808.

The purpose of a bill of particulars is to secure "facts, not legal theories," *Kempe v. U. S.* (8th Cir. 1945), 151 F.2d 680, and a defendant's request for a bill of particulars should be "liberally interpreted," *U. S. v. O'Connor* (2nd Cir. 1956), 237 F.2d 466.

It is true that a bill of particulars is not to be used as a "fishing expedition" nor merely to try and "get the government's evidence." But it does violence to the English language, and to the notion of due process, to boot, to call the modest request by the defendants—a bill of particulars indicating the dates of alleged divulgence of use—either a "fishing expedition" or an attempt to get the government's evidence. In summarily rejecting this modest request, the court clearly exceeded its discretion.

In ordering a bill of particulars as to, inter alia, time and place, Justice Whitaker, when a District Judge, said, in *U. S. v. Smith,* (W.D., Mo. 1954), 16 F.R.D. 372, that:

> "Certainly the fact that an indictment on information conforms to the simple form suggested in the rules is no answer or defense to a motion for a bill of particulars under Rule 7(f). Rules 7(f) necessarily presupposes an indictment or information good against a motion to quash or a demurrer. Its proper office 'is to furnish to the defendant *further information* respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial.' and when necessary for these purposes, it to be granted even though

it requires 'the furnishing of information which in other circumstances would not be required because evidentiary in nature', and an accused is entitled to this 'as of right'. U. S. v. U. S. Gypsum, D.C., 37 F. Supp. 398, 402. To the same effect are Singer v. U. S., 3 Cir., 58 F.2d 74, U.S. v. Allied Chemical & Dye Corp., D.C., 42 F. Supp. 425, 428; Fontana v. U. S., 8 Cir., 262 F. 283. It seems quite clear that 'where charges of an indictment are so general that they do not sufficiently advise defendant of the specific acts with which he is charged, a bill of particulars should be ordered.' Cases cited and U. S. v. Grossman, D.C., 55 F.2d 408; Chew v. U. S., 8 Cir., 9 F.2d 348, 353.

"This must necessarily be true when we realize that there is no discovery means in criminal cases, such as provided by the civil rules for civil cases, and that the only means open to a defendant, in a criminal case, for the securing of the details of the charge against him is that afforded by Rule 7(f) of the Federal Rules of Criminal Procedure. 'Bills of particulars have grown from very small and technical beginnings into most important instruments of justice. * * * While they are not intended to advise a party of his adversary's evidence or theory, they will be required, even if that is the effect, in cases where justice necessitates it.' U.S. v. Balaban, D.C., 26 F. Supp. 491, 499.

"Nor is it any answer to a motion for a bill of particulars for the government to say: 'The defendant knows what he did, and therefore, has all the information ncessary.' This argument could be valid only if the defendant be *presumed to be guilty.* for only if he is presumed guilty could he know the facts and details of the crime. Instead of being presumed to be innocent, it must be assumed 'that he is ignorant of the facts on which the pleader founds his charged.' Fontana v. U.S., 8 Cir., 262 F. 283, 286; U.S. v. Allied Chemical Corp., D.C., 42 F. Supp. 425. This conclusion seems to me to be elementary, fundamental and inescapable.

> Without definite specification of the time and place of commission of the overt acts complained of, and of the identity of the person or persons dealt with, there may well be difficulty in preparing to meet the general charges of the information, and some danger of surprise."

Particularly where there was no showing that such a bill of particulars would in any way jeopardize the government's case or imperil the government's position, the court's ruling was error.

C. Insufficiency of Counts V, VI, VII and VIII as to Elkins.

Counts V to VIII inclusive, alleged an unlawful use by defendant Elkins for his own benefit or the benefit of others not entitled thereto of the existence, contents, etc., of allegedly intercepted wire communications. Here again, these counts are clearly insufficient under Rule 7(c), F. R. Cr. P., because there is no "plain, concise and definite statement" of the facts constituting the offense by reason of the fact that there is no description whatsoever of the *manner* of alleged "unlawful use." Therefore there was insufficient clarity in these allegations, either to enable the defendant Elkins to prepare his defense, or to enable him later to plead a judgment of acquittal or conviction as a bar to a subsequent prosecution. See the authorities cited immediately above.

Furthermore, an alternate request was made that the government be required to furnish a bill of particulars spelling out the manner of alleged use and benefit. This modest request, similarly neither a fishing expedition nor a move to get the government's evidence, was sum-

marily denied by the lower court despite the absence of any showing by the government that such would endanger the government's case; in this denial the court exceeded it discretion, which calls for reversal.

It should be emphasized that defendant Clark also joins in this argument, although these counts, V through VIII, do not charge him with any "use."

D. Counts V. VI, VII and VIII each charge two crimes.

In each of Counts V through VIII, the government attempted a shotgun marriage of a clause 2 crime and a clause 4 crime, thus rendering each count faulty in stating two crimes, or else in containing prejudicial matter. (The "withdrawn" counts, III and IV also suffered from this infirmity.)

It will be recalled that a clause 2 crime consists of a wilful and knowing interception plus divulgence of a communication; clause 4, on the other hand, requires wilful and knowing divulgence or use, *not by the interceptor* (for interception, per se, has no part in clause 4) but by one who receives, or becomes acquainted with a communication, knowing the same to have been unlawfully intercepted. But a mixture of the two does not constitute a crime under either, yet such amalgam is precisely what the plaintiff charges in Counts V through VIII. Each of these counts charges half of clause 2—interception—and half of clause 4—divulgence and use knowing that the information was "so obtained." Hence, these counts clearly fail to state a completed crime under either clause, and they should not be allowed by this count to stand.

E. Failure of Counts II through IX to allege wilfulness and knowledge.

Section 501 of Title 47, U.S.C.A. specifies that:

> "Any person who *Wilfully and knowingly* does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who *wilfully and knowingly* omits or fails to do . . . shall . . . be punished etc. . . ." (Emphasis supplied).

To constitute the crime, therefore, a person must *wilfully and knowingly* intercept and must *wilfully and knowingly* divulge, under clause 2. Under clause 4, of course, the divulgence or use by one in the specified class must likewise be wilful and knowing. Mere inadvertent, careless or negligent interception, divulgence or use will not suffice.

Indeed, the trial judge seems to have recognized this when he said, in his opinion denying the motion to dismiss: "Under some circumstances the disclosure of the violation could be harmless, while in others it would be evil." (Tr. 77).

And again, in denying the supplemental Motion to Dismiss, the lower court said:

> "Now, of course, *we know that there can be inadvertent interception of messages.* We have all had the experience of talking long distance on the telephone, an interstate commerce communication, and hear, through some technical defect or switching of the wires, another conversation which is, in due course, interrupted and placed on its own proper channel. That is *an inadvertent interception.*
>
> "*Many times there can,* likewise, *be an inadvertent disclosure of the content of a message inadvertently received.* But, we are not troubled with that.

> "These indictments alleged an unlawful intent. And, of course, there must be the evil mind in all of these transactions or no crime has been committed." Emphasis supplied) (M.S. Tr. p. 29).

Counts II through IX, (the substantive counts) while carefully alleging that the interception was done "wilfully, knowingly and unlawfully" completely fail to allege a *wilful or knowing divulgence or use* by the defendants. Hence, they fail to state a crime against defendants. Count II, for example, merely alleges that defendants "did knowingly, wilfully and unlawfully . . . intercept . . . and divulge . . .", while Count IX merely alleges that defendant "did knowingly, wilfully and unlawfully . . . intercept . . . and did divulge . . ."

Counts V through VIII, allege (with minor variations) that defendants "did knowingly, wilfully and unlawfully intercept . . . and defendant Elkins did thereafter . . . divulge . . . and use . . ."

Clearly, the substantive counts fail to allege a *wilful and knowing* divulgence or use. Since wilfulness and knowledge are required, in order not to punish an inadvertent divulgence or use, these counts fail.

> "When 'wilfulness' is made an essential element of an offense, as it is in this case, it is a general rule that a failure to allege wilfulness is fatal to the indictment. Citing Rule 7(c) and cases". *Marteney v. U. S.* (10 Cir., 1956), 218 F.2d 258.

See also *Screws v. U. S.* (1945), 325 U.S. 91, 89 L. Ed. 1495.

True, it is, as was said by the 4th Circuit in the recent case of *Finn v. U. S.* (May 28, 1958), 256 F.2d

304, that "words of similar import" may cure the otherwise fatal defect of failure to allege wilfulness or knowledge where they are elements of the crime. That was a case dealing with profanity at an airport contrary to airport regulations, and the court held that a person could not conceivably conduct himself "in the manner described—'without just cause or excuse and in a riotous or disorderly manner, use loud and profane language' —otherwise than knowingly and wilfully."

Here, however, divulgence or use could be entirely inadvertent, and there are no descriptive words in the counts which would aid the bare charge of "divulgence" or "use." The language of the indictment descriptive of or relating to divulgence is devoid of "such words of similar import" as would supply the fatal omission of wilfulness and knowledge. Hence, these counts must fall for this fatal defect. See also *Pullen v. U. S.*, 5 Cir. 1957, 164 F.2d 756.

F. Sec. 605 is unconstitutional.

Section 605 of Title 47 is unconstitutional because it attempts to create a penal offense without having made the same sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties and because it forbids the doing of acts in terms so vague that men of common intelligence would, of necessity, have to guess as to its meaning and would differ as to its application. It is, therefore, in violation of the due process clause of the Constitution.

In *Lanzetta v. New Jersey* (1939), 306 U.S. 451, 83 L. Ed. 888, the Supreme Court stated:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Citing cases. *It is the statute, not the accusation under it, that prescribes the rule governing conduct and warns against transgression.* Citing cases. *No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.* All are entitled to be informed as to what the state commands or forbids. The applicable rule is stated in *Connally v. General Construction Company,* 269 U.S. 385, 70 L. Ed. 322: 'That the terms of a penal statute create in a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, constant alike with ordinary notions of fair play and the settled rules of law. And the statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess it its meaning and differ as to its application violates the first essential of due process of law.'
> " * * * the terms it (the statute) employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause . . ." (Emphasis supplied).

See also, *U. S. v. Cohen Grocery Company* (1921), 255 U.S. 81, 65 L. Ed. 516, and the annotation at 96 L. Ed. 374.

As noted above, the statute contains four clauses; clauses 1 and 3 relate to "interstate or foreign communication by wire or radio." Both clauses 1 and 3 make criminal certain conduct by those who are receivers or

transmitters of "any interstate or foreign communication by wire or radio."

Since Section 153 of Title 47 defines the terms "wire communication," "radio communication," and "interstate communications," it seems clear that Congress specifically limited the operation of clauses 1 and 3 to communications in interstate commerce, and to communications by wire or radio.

Clauses 2 and 4, however, confront us with an entirely different situation. Clause 2 is not limited to "any interstate or foreign communication by wire or radio"; clause 2 purports to apply to "any communication." And clause 4 is of similar breadth, since it relates to "any communication" specified in clause 2. Clauses 2 and 4, therefore, not being delimited by the term "interstate and foreign communications by wire or radio," and purporting to affect "any communication," are so broad and so vague that men of common intelligence must necessarily guess at their meaning.

It will not do to say that we may read into clauses 2 and 4 the phrase "by wire or radio" or the phrase "interstate or foreign communication," because this construction is clearly forbidden by the Supreme Court's language. The term "any communication" means just what it says, *"any* communication," *regardless of the means of transmission whether by wire, radio, interoffice communication, human voice or any other means by which one person can communicate a message to another.*

In the first Nardone case, *Nardone v. U. S.* (1937),

302 U.S. 379, 82 L. Ed. 314, the government introduced communications of defendants obtained by a federal agent who tapped defendants' telephone wires. In seeking to justify, the government contended that even though clause 2 said "no person . . . shall intercept" it did not apply to federal agents; and that although clause 2 forbids divulgence to "any person" it did not apply to "divulgence" in court. Speaking for a seven member majority, Mr. Justice Roberts said:

> "*Taken at face value* the phrase 'no person' (in clause 2) comprehends federal agents and the ban on communication to 'any person' bars testimony to the content of an intercepted message. Such an application of the section is supported by comparison of the clause concerning intercepted messages (clause 2) with that relating to those known to employees of the carrier, clause 1 and 3. The former may not be divulged to any person, the latter may be divulged in answer to a lawful subpoena" * * *
>
> * * *
>
> "We nevertheless face the fact that the *plain words* of section 605 *forbid anyone,* unless authorized by the sender to intercept a telephone message and direct an equally clear language that 'no person' shall divulge or publish the message to it or its "substance to 'any person'. *To recite the contents* of the message in testimony before a court *is to divulge* the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's argument." (Emphasis supplied).

This decision was subsequently approved by the court in the second Nardone case, *Nardone v. U. S.* (1939), 308 U.S. 338, 84 L. Ed. 307. Similarly, in *Weiss v. U. S.* (1939), 308 U.S. 321, 84 L. Ed. 298, decided the same day, the court used the "face value" rule of construction.

Because Nardone and Weiss were evidence cases rather than cases charging a criminal violation of Section 605, the constitutional infirmities of the broad language of 605 as a penal statute lay hidden, to come to light only in criminal prosecutions such as the case at bar.

Taking the statute at face value, it makes criminal a multitude of ordinary every day human activities, because it forbids interception and divulgence of *"any communication," not merely communications in interstate or foreign commerce. It is only by reading into the statute* something that Congress did not put there, *that it can be saved.*

In order for 605, as a penal statute, to be narrowed to constitutionality and not left so broad and vague as to make "men of common intelligence guess at its meaning" the court is going to have to read into clauses 2 and 4 the words "wire or radio communication" and the words "interstate (or intrastate) communication." However this would require the court to engage in legislation.

This statute, construed at face value, is clearly unconstitutional because it sweeps within its net a great multitude of activities, many of which are clearly harmless. If it be said that Congress intended the necessary words to be read implicitly into clauses 2 and 4, why then were those words put, with precision, into clauses 1 or 3?

The provision in the last part of section 605:

> "Provided that this section shall not apply to the receiving, divulging, publishing or utilizing the con-

> tents of any radio communication, broadcast or transmitted by amateurs or others for the use of the general public or relating to ships in distress."

conclusively indicates that Congress, by this exception, intended 605 to apply *to all communications other than the ones expressly exempted from the statute by the provision.* It is a necessary presumption that all that is not clearly embraced in the exception remains within the scope of the principal provision. See Sutherland on Statutory Construction, Section 328 and *Hopkins v. U. S.* (8th Cir. 1916), 235 F. 95. Thus, Congress, in exempting amateur and distress broadcasts, etc., meant the statute to cover all other communications, of any kind whatsoever, wire, radio, interoffice communications, voice; *all others* purport to be within the scope of the statute.

Since clauses 2 and 4 apply to "any communication" of any kind it necessarily follows that they are violative of the due process clause and void for vagueness. It will not do to say that courts can apply the statute to various cases as they arise: this would be to embark upon a course of conduct so vigorously condemned by the Supreme Court in *U. S. v. Harris*, 106 U.S. 629, 27 L. Ed. 290:

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would to some extent substitute the judicial for the legislative department of the government. The courts enforce the legislative will, when ascertained, if within the constitutionally granted power. But if Congress

> steps outside of its constitutional limitations and attempts that which is beyond its reach, the courts are authorized to and when called upon must acknowledge encroachment upon the the reserve rights of the states and the people."

This is not a strained, technical or artificial construction of the statute. We neither take away from section 605 any word or any phrase nor insert any word or any phrase therein. The term "any communication" means just what is says, any communication. Criminal statutes must be strictly construed in favor of the defendant and against the government. Even the normal rule that a statute is presumed to be constitutional will not save § 605.

The statute says, "any communication" and that is what the statute means, unless this court either reads into its something which Congress did not put there or reads out of it something which is clearly an innocent act, and not "intended" to be within its scope. If it is necessary for the court to read into the statute a narrowing provision to save its constitutionality, Congress has therefore required men of common intelligence at the peril of their liberty to arrive at the same construction, and it has therefore "set a net large enough to catch all possible offenders" leaving it to the courts to "step inside and say who can be rightfully detained and who should be set at large." Such an imposition upon the ordinary man of common intelligence is far too great to find constitutional sanction in our system. Such a burden is neither due process nor fair play.

We further contend that insofar as § 605 purports

to authorize Congressional control over intrastate communications, the statute encompasses conduct clearly outside the scope of Congress' delegated power under the Commerce Clause, is an invasion of the Police Power of the several states and is therefore unconstitutional and void.

For all of the foregoing reasons, Appellants claim error in the indictment and in the rulings made by the lower court relative thereto.

STATEMENT OF PERTINENT FACTS ON MOTION TO SUPPRESS

Because of the complex factual picture surrounding this case, defendants deem it advisable to set forth in this Statement of Pertinent Facts those facts relative to the Motion to Suppress, the denial of which is assigned as one of the specifications of error.

Late on the night of Thursday, May 17, 1956, armed with a search warrant, issued by State District Court Judge Mears, which authorized a search of defendant Clark's home *only for "obscene and indecent photographs with accompanying sound recordings,"* five Multnomah County (Oregon) Sheriff's deputies, two newspaper reporters and a news photographer broke into the defendant Clark's house. Clark was absent at the time, though Clark's wife and another lady were there (M.S. 397-400). The raiders rummaged through Clark's house for more than two hours (and illegally seized a great many items—e.g., children's films, musical

recordings, etc.). *No obscene or indecent photographs, either with or without accompanying sound recordings were located.* Among the great many items which were illegally searched for and seized in Clark's house were five electronic tape recordings, each contained in an individual box, a minifon wire recording machine, and three spools of minifon recording wire (Def. Exs. 16, 17).

After the raiding party finished, the Sheriff of Multnomah County (who joined the raiders half way through the raid) made copies of the tapes during the early morning hours of Friday, May 18, 1956, and turned the copies over to the two newspaper reporters for the purpose of "preserving the evidence" (M.S. 102).

Since the following three days were non-judicial days —Friday the 18th being primary election day, and no court being held on Saturday, the 19th and Sunday, the 20th of May, it was Monday, May 21, 1956, before Clark was able to file his motion to suppress the evidence thus illegally seized from his house. The main thrust of Clark's motion was that the underlying affidavit, although sworn to by Langley (the then District Attorney for Multnomah County), was based solely upon information and belief, contrary to the clear requirements of Oregon law that search warrants issue only upon "probable cause, supported by oath or affirmation" (Oregon Constitution, Art I, § 9 and § 141.030, Oregon Revised Statutes). (At the time, Langley was then under investigation in the Portland vice investigation being made by the Attorney General of Oregon, assisted by the State Police, as a result of a

directive of the Governor of Oregon made following newspaper publication of revelations made by defendant Elkins, substantiated by tape recordings of Langley's consorting with hoodlums to "set up the town.") (Tr. 11-14) (Def. Ex. B—Motion for Continuance, Mar. 18, 1857).

State law requires the officer who serves the search warrant promptly to return it to the issuing court; however, it was not until May 22, the second day of the suppression hearing in State District Court, that the deputy sheriff in charge of the raid made his formal written return to the District Court. The five tape recordings seized in the raid were not produced in the District Court in the suppression hearing until Tuesday afternoon, May 27 (Def. Ex. 21, p. 70). Indeed, even before the deputy sheriff made his return on the warrant, Langley as District Attorney, had taken one of the tapes before the State Grand Jury, and Elkins and Clark who are also the defendants here, were charged with a violation of Oregon's wiretap law, ORS 167.570 (M.S. 352).

After a three-day hearing in State District Court, from May 21 to 23, inclusive, District Judge Mears, who stated that he had issued the warrant in misplaced reliance "upon the integrity" of Langley, found that the affidavit was faulty, since it was based solely on Langley's alleged information and belief, declared the search warrant to be a "nullity," and suppressed as evidence everything seized in the illegal raid. This ruling was made despite strenuous contentions by Langley's deputies that (1) returning of the indictment by the

State Grand Jury vested jurisdiction over the tapes and other seized items in the State *Circuit* Court, thus depriving the State *District* Court of jurisdiction; and (2) that the State District Court or Judge had no jurisdiction to entertain the motion to suppress because the five tape recording constituted evidence of violation of the federal wiretap statute, Title 47, § 605 (Ex. 12, Motion to Suppress).

As early as May 18, the day after the raid, District Attorney Langley, in a letter to the State Attorney General, was raising the spectre of a prosecution under the Federal wiretap statute (M.S. 343).

After the State District Court suppression hearing was finished, District Judge Mears, instead of returning the tapes and other seized paraphernalia to defendant Clark, ordered that,

> ". . . in view of the executive order from the Governor of the State of Oregon, the remaining property be and the same is hereby ordered impounded in the possession of the Sheriff of Multnomah County to be held at and released upon only the direction of the Attorney General of the State of Oregon or such higher circuit or supreme court before whom the matter may be heard."

Thereafter, pursuant to this order, the sheriff, on May 29, 1956, turned over the five tape recordings, the minifon recording machine and three spools of minifon recording machine wire, together with other paraphernalia to the Attorney General and the Oregon State Police (M.S. 435-9). The Attorney General delegated the custodial responsibility for the various items to the

State Police, and acting thereunder, the State Police Officer Cross, on June 4, 1956, rented a safety deposit box in a bank and placed therein the boxes containing the five tapes, the minifon and the spools of minifon recording wire (M.S. 440).

On Monday, May 21, the Multnomah County Sheriff called in the F.B.I. for their "advice" and, as a result of this call, shortly after noon on May 22, F.B.I. agents Sherk and Smith went to the Multnomah County Court House where Deputy Minielly, who had led the raid on Clark's house, brought in the tape recordings (M.S. 174). Sherk commenced playing one of the tapes, but in the middle of it Minielly rushed back in the room, told Sherk the tapes were wanted by the grand jury, and thus ended the Sherk monitoring session (M.S. 195). Sherk said that he went to the Sheriff's office speculating (from reading newspaper accounts) that the tapes might "contain evidence of a federal violation." He said that the portion of the one tape which he did hear contained recorded conversations between several different individuals, that he didn't know "who the individuals were," although "he had reason to think" that he "recognized one of the voices" on the tapes, namely, the voice of District Attorney Langley (M.S. 188, 190).

Sherk said there were notes in each of the boxes, which notes contained names of individuals, purportedly being the individuals whose conversations were recorded on the tapes. He could not, however, remember the color of the tape boxes. Originally he said he saw

five tapes, each in a box (M.S. 193), but later he recalled that even though he saw five *boxes* there were only *four* tapes (Tr. 177). Sherk marked neither the tapes, the plastic tape reels, the notes, or the boxes, in any way, because he "wasn't over there to take those tapes into Federal custody or to mark them as evidence in Federal Court" (Tr. 179). This listening session which lasted about thirty minutes "was the only contact" that Sherk had with the five tape recordings (except for a brief visual inspection on August 13, 1956) (M.S. 236), until after the Federal search warrant was issued and executed on September 5.

While the tape recordings and the other items just mentioned were in State custody in the safety deposit box, F.B.I. agent Sherk, in company with two State Police officers, visited the bank on August 13, 1956, where the safety deposit box was opened, and Sherk then visually examined all of the items contained in the box—noticing the five tape recordings, the five individual boxes in which each one was contained, the Minifon and the three spools of Minifon recording wire. He did not, however, recall seeing the notes contained in the boxes of tape on this visit (M.S. 275-280, 290-294).

More than three weeks later, on September 5, 1956, Sherk went before the United States Commissioner and swore out an affidavit for a search warrant, the material portions of which are as follows:

> ". . . heretofore, on May 22, 1956, in the State and District of Oregon, I listened to portions of electronic tape recordings of conversations which re-

> cordings contained intercepted telephone conversations designed or intended for the use or benefit of a person or persons other than senders of such messages and the benefit of a person or persons note entitled thereto, in violation of Title 47, § 605, U.S.C.A. I am positive said recorded conversations and evidence of such intercepted telephone messages are among five tapes of electronic tape recordings and one minifon recording machine wire and four spool of minifon recording machine wire which said properties containing evidence of such recorded intercepted telephone conversations are located in Safety Deposit Box 912 at The First State Bank of Milwaukie, Oregon, 1036 Main Street, Milwaukie, Oregon. I further depose and say that I have personal knowledge that said properties are located on said premises and that I am positive that they are so situated." (Rec. 6).

Based upon this affidavit, and despite the fact that agent Sherk had not heard all of the five tapes, *but only a portion of one of them* (M.S. 176), *and had not heard any of the minifon recording machine wire* (M.S. 175), the United States Commissioner issued a search warrant (Rec. 7 and 8), which was immediately thereafter served by agent Sherk and another F.B.I. agent, by taking the five tapes, the minifon and recording wire into federal possession (Rec. 9).

Parenthetically, it should be noted that after the *state* wiretap indictment had been returned against the defendants Elkins and Clark, jurisdiction of the matter was taken over by the State Attorney General. Thereafter, defendants Elkins and Clark moved in State Circuit Court (which has jurisdiction of grand jury indictments in Oregon) for an Order suppressing as evidence on that indictment the five tape recordings and

the other items seized in the raid on Clark's house. This motion was pending at the time of the federal seizure on September 5, 1956, and on September 17, 1956, Circuit Judge Lonergan ruled that the raid on Clark's house was "very, very irregular and very improper," and hence that the "search and seizure was entirely illegal." The Judge stated from the bench that "*as a matter of law the search warrant was not legal and the search and seizure, therefore, was not legal either.* In that case I am allowing the motion in that regard, but I am turning over the matters that were found at that time to the Attorney General *to be used and disposed of only on order of the Court* (emphasis supplied)." the Judge further remarked that:

> "If the grand jury of this county has turned any of the material or any of those things that were taken by this illegal search warrant to the government of the United States, the grand jury had no authority whatsoever to do anything of that kind. *No one has any authority to dispose of that or use it in any way without an order of the court.* No order of the court that I know of has ever been issued to anyone for that purpose." (Emphasis supplied) (Rec. 66-70 at 67).

One of the District Attorney's deputies, who had been called in by the Attorney General to assist in defending against the motion to suppress in State Circuit Court, instead recommended to the Court that the Elkins and Clark motion to suppress be granted, *so that a federal prosecution would thereby be facilitated* (M.S. 367).

Defendants herein, after they were indicted in this case on February 4, 1957, on a nine-count indictment,

timely moved the court below under Rule 41, F.R.Cr.P., for an order returning the property seized by F.B.I. agent Sherk from the safety deposit box and suppressing it as evidence in this case. Affidavits which were uncontradicted by the Government, were submitted by defendants in support of this motion. Also, defendants presented testimony from a great variety of state officials, from F.B.I. agent Sherk, as well as exhibits in support of the motion to suppress.

Several state and federal law enforcement officials testified that there was a common practice and general understanding existing between state and federal officials in this area that when evidence of federal violations or information concerning the same was uncovered by state officials, they would make the same available to federal officials, and vice-versa (M.S. 126-8, 133-5, 164-6, 327, 433, 443-4).

At the hearing on the motion to suppress, F.B.I. agent Sherk said that in his opinion the recorded conversations on the portion of the one tape which he listened to on May 22, 1956 were "telephone conversations based upon the buzzing noise that one hears when a telephone rings . . . what appeared to be long distance operators and secretaries handling telephone calls . . ."; he said that in his opinion, "part of the tape was a so-called room recording and part of it was a recording of telephone conversation" (M.S. 225).

When asked how he "knew" the recorded conversations were intercepted telephone conversations, Sherk answered:

> "Well, they were not live telephone conversations, they were recorded. And therefore, they must have been intercepted."

and further, he said:

> "Well, I felt then and I feel now that the fact that they were there recorded on the tape was proof that they had been intercepted within the meaning of the Statute." (M.S. 226).

Asked if he had *any other* reason to believe that the telephone conversations were intercepted, other than merely because "they were recorded on the tape," he replied that he had "reason to believe—but not of my own knowledge" (M.S. 227).

When asked what knowledge of his own he had that the allegedly intercepted telephone conversations contained on the tapes were "designed or intended for the use or benefit of a person or persons other than senders" Sherk replied, "May I ask the Court to take judicial knowledge of the statements in the public press?" (M.S. 229). Sherk went on to reply, when the same question was repeated:

> "First, *the considerable publicity and the public press* concerning tape recordings allegedly, according to the press, made by the same defendants that are here present. Secondly, *the fact that the tapes were obtained by the sheriff's office, so they told me,* from a source other than the parties to the conversations appearing on the tapes." (Emphasis supplied) (M.S. 230).

F.B.I. agent Sherk stated also that when he used the language in the search warrant: "said recorded conversations and evidence of such intercepted telephone

messages are among five tapes of electronic tape recordings," he meant the portion of *the one tape recording* which he heard on May 22 in the sheriff's office (M.S. 231-232). Sherk also testified that he was mistaken in making out his affidavit for search warrant for *four* spools of minifon recording machine wire when in fact there were only three (M.S. 232,293). Sherk also testified that he never heard or listened to the spools of recording machine wire until after the search was made on September 5 (M.S. 233). When asked why he sought a search warrant for five tape recordings in his affidavit, when he had only heard a portion of one tape, the witness replied, "Because there were five there. *I couldn't be sure which one contained the conversations that I had heard and I had reason to believe that all five of them contained intercepted telephone conversations*" (M.S. 233).

When asked why he had reason to believe that all five tapes contained intercepted conversations Sherk replied "Because *the notes* on all five boxes *were similar* and because *I had been informed* by the sheriff's office that they contained intercepted telephone communications" (M.S. 233-4).

This colloquy then occurred (M.S. 234-5):

"Q. Then you relied, then, in making this affidavit in this particular respect upon at least in part what someone else told you concerning those tapes, is that correct?

A. In part, yes.

Q. Did the notes themselves say they were intercepted telephone communications?

A. No, they did not.

Q. Did they say telephone on the notes?

A. No.

Q. Now, let's go to the spools of Minifon recording-machine wire, Mr. Sherk. Were there any notes on the spools of wire?

A. No.

Q. You never heard the spools of wire played until after you secured them under the search warrant, did you?

A. No.

Q. Then, of your own knowledge—up here (indicating)—of your own knowledge you did not know that the four spools of Minifon recording-machine wire or three, we are not going to quibble about it, you did not know that they contained anything, did you?

A. Only what I had been told.

Q. In other words, you were depending entirely upon what someone else told you in regard to the Minfon?

A. Plus the fact that the machine is designed for intercepting communications.

Q. Well, it is also designed, is it not, to pick up we will say, symphony music? It could?

A. Yes."

Sherk also admitted that with respect to the individuals whose names were on the notes in the box, and which he speculated might have referred to the individuals whose voices were recorded on the tapes, that with the exception of District Attorney Langley, he never talked to any of those individuals until after he signed the affidavit for the search warrant (M.S. 240-243).

Sherk also testified as follows (M.S. 281-282):

"Q. Did you know of your own knowledge on August 13 '56, that the tapes that you saw in box 912 in the Milwaukie State Bank were the same

tapes that you saw in the Sheriff's office on May 22, 1956?

A. I was convinced that they were but they had not been in my possession during all that time and that is the only way I could have known positively.

Q. Well, is it possible to have a tape on a reel and to hold it in your hand and look at it and say of your own knowledge that that is a certain particular tape from the tape itself?

A. Well, in this case—

Q. No. Just answer that question first and then we will go on.

A. Well, I suppose it would be possible to mark it in some way so that you could identify it. But I didn't do that in this case.

Q. The tape or the—

A. The tape.

Q. —reel?

A. No.

Q. Did you mark the reels?

A. No.

Q. You didn't mark the tape?

A. No."

And further on page 290, the following testimony was given by Sherk:

"Q. By merely looking at a piece of electronic tape, and speaking of these five particular tapes now, by merely looking at the tape itself could you tell what conversations were on the tape, if any?

A. I am not an electronic expert but I feel sure that this answer is correct that *No you could not tell.*

Q. That's what I thought.

A. This particular type of tape, the sound markings on there leave no mark.

Q. They leave no mark?

A. No visible mark." (Emphasis supplied).

Further on (M.S. 294) Sherk testified as follows:

"Q. Now, in between August 13, 1956, and Sep-

tember 5, 1956, did you see any of the articles that were seized under the search warrant on September 5, 1956?

A. No.

Q. You didn't visit the First State Bank of Milwaukie during that time?

A. No.

Q. Did you on September 5th prior to the execution of the search warrant visit the First Bank of Milwaukie?

A. No.

Q. Never at any time from August 13, 1956, until the box was opened pursuant to the search warrant did you see the articles that you seized under the search warrant?

A. No."

And further on (M.S. 297-298) the following occurred:

"Q. Now, Mr. Sherk, just before you opened the box did you know of your own knowledge—now, not through what some other person told you—but, did you know of your own knowledge that the articles which you found there were in the box immediately before you opened it at that time?

A. In the sense in which you have phrased the question, no.

Q. Yes. And, that's equally true that you did not know of your own knowledge that the articles which you subsequently seized under the warrant were in the box at the time that you made your affidavit; that is, of your own knowledge?

A. In the sense in which you have phrased that question no affiant appearing before a United States Commissioner in the Courthouse here could know of their own knowledge that anything was located at a point distant from there.

Q. Well—

A. So, the answer is no.

Q. The answer is No, isn't it?

A. Yes."

Sherk also admitted that the basis of his statement in the affidavit that the tapes were designed or intended for the use or benefit of a person or persons other than the senders of such messages was merely a "conclusion" of his, based upon the "nature of the tape" which he had heard May 22, 1956 in the Sheriff's office (M.S. 307).

Sherk also admitted that he didn't know anything about what was on the other four tapes from listening to the fifth tape; and that his only knowledge of what the other four tapes contained was that he had heard what was on them from other people; i.e., hearsay (M.S. 311).

However, before defendants were concluded with their interrogation of Sherk, on matters relating to his knowledge at the time he executed the affidavit, in support of defendants' theory that the federal search itself was invalid because of the insufficiency of the affidavit, and the affiants' knowledge, the Government objected to any such further inquiry (M.S. 313-315). Thereupon, the Court, in effect, sustained the Government's objection. The following, rather lengthy colloquy is quoted, however, because defendants deem it important in showing what we submit to be the error of the ruling:

> "THE COURT: Well, I think your motion as now presented forces the Court to at this time rule on one of the very substances of the matter.
>
> May I ask you, Mr. Luckey—
>
> MR. CRAWFORD: May I be heard?
>
> THE COURT: Surely you may be heard. But, let me lay the premise first.
>
> MR. CRAWFORD: Pardon.

THE COURT: May I ask you, Mr. Luckey, what is the Government's position—do you rely upon a valid search and seizure under the—let me put it this way: Do you contend that the possession of the articles by this Court now depends upon the validity of the Federal search and seizure?

MR. LUCKEY: I don't suggest, Your Honor, that the validity of the Government's present possession depends upon the validity of the search and seizure as to these defendants.

THE COURT: Yes. I understand your postion.

MR. LUCKEY: Because, unless there is an original—unless the Government has infringed upon their constitutional rights.

THE COURT: In other words, I take it it is your position that this Court's inquiry is not whether or not— it makes no difference whether or not the Federal seizure was pusuant to a valid search warrant.

MR. LUCKEY: That's right. Because, I suggest, Your Honor, that under the cases if the State authorities who first themselves conducted the illegal search and seizure had handed them over on a silver platter to the Federal authorities they would have been admissible.

THE COURT: Now, of course, we understand—

MR. LUCKEY: These are subsequent matters of getting them that are mere formalities and serve to get them there perhaps by a more delicate and discreet manner. But, as to the necessity of sustaining the search warrant, I don't for one minute suggest that it isn't a valid search warrant. But, my point is that we are wasting time on an inquiry that isn't relevant.

THE COURT: Well, if that's the effect, you force me right now to decide the question.

May I inquire now from the defendants? Is it your position in this matter that if this was not a valid search warrant the Government can in no event sustain their rights to this property?

MR. CRAWFORD: That is one of our grounds.

THE COURT: All right. I will have to hear you on it, then, because I have got to determine the phase of this motion as to, first of all, whether the Government will not abandon its position. It insists that it is a valid search warrant. So, now, I have got to determine whether or not it makes any difference whether or not it is a valid search warrant.

MR. CRAWFORD: Well, I am not through my evidence on whether or not it is valid.

THE COURT: The Government has forced me to rule whether or not your inquiry is even proper.

MR. CRAWFORD: Your Honor, I don't believe that the United States Attorney has—it has occurred to him what the Government's position is at this time.

Now, I could appreciate and agree with the Government's position with these defendants not indicted. But, now they are indicted. What are they indicted for? They're indicted because, necessarily, in order—and in order to prove the indictment and each count thereof the Government must prove that these defendants were in possession or were the owners of these very articles which the defendants are seeking to supprss.

Now, that, you see, is after indictment. Now, before indictment we certainly would be in a different position. Before indictment I believe it unquestionably would be incumbent upon the defendant in order to maintain this motion to suppress to show, one—either, one, they were the owners—

THE COURT: Well, I don't want to interrupt your train of though on it, Mr. Crawford, but we are not involved in that question now.

MR. CRAWFORD: Well, I thought he raised the very question? I took notes? He says the—

THE COURT: Well—

MR. CRAWFORD: He said that the defendants must accept the illegality of the search without admitting the peril. I took it—I understood him

to say that we must show that we had an interest in this search.

THE COURT: Granted, the District Attorney did say that. But, he said—of course, your evidence is not in yet.

MR. CRAWFORD: It isn't in, Your Honor.

THE COURT: But, that isn't his point of inquiry. His point of inquiry is now objecting to your line of examination of this witness as to his knowledge in connection with the search warrant, in his execution of the search warrant. Now, the Government has raised the question that it does not make any difference, conceding for the sake of argument that this was an invalid search warrant—it makes no difference to the Government's right to use this evidence.

MR. CRAWFORD: All right.

THE COURT: So, I have asked you now do you—

MR. CRAWFORD: I will show that:—

THE COURT: All right.

MR. CRAWFORD: —I will show, then, that on May 17, 1956, that these articles, as far as we know—and, when Your Honor hears the evidence you will realize why I say 'as far as we know'—were in the residence and home, dwelling house and abode of the defendant Clark where they were taken by virtue of an illegal raid by the Sheriff of Multnomah County, Oregon; that thereafter the same identical articles were given by the sheriff of Multnomah County, Oregon, to the Attorney General of the State of Oregon—or, rather, into the hands of one of the officers of the State Police for and on account of the Attorney General of the State of Oregon in the presence of the Attorney General of the State of Oregon and that thereafter the same tapes and other evidence—other articles of evidence were under the control and in the possession of the same Oregon State policemen; and that pursuant to this search warrant which is in evidence here and in the files of this case the

F.B.I. through its agents took and now have possession of the tapes. And, I will show an unbroken line, I do believe.

THE COURT: All right. I haven't yet been able to make the query that's in my mind. I can't get it across.

Now, accepting your statement as it is, do you contend that the Government's possession would still be illegal if the State policemen had turned them over to Mr. Sherk without a search warrant?

MR. CRAWFORD: Yes.

THE COURT: Then, it is your position if the search warrant is valid then the Government's right to it—had a right to take them from the police officer?

MR. CRAWFORD: No.

THE COURT: All right. Then, why do you make an inquiry as to the illegality of the search warrant?

MR. CRAWFORD: As I stated here before, Your Honor—I will restate my theories. And, I believe that I am on firm ground. 1. If on the original raid—

THE COURT: Now, we are not concerned with the original raid. We are only concerned at this point of inquiry as to whether or not the search warrant held by Mr. Sherk was a valid search warrant.

MR. CRAWFORD: That's all I was inquiring about.

THE COURT: That is the basis of Mr. Luckey's objection. Because, he said it doesn't make any difference whether it's valid or not.

MR. CRAWFORD: Well, I do not agree with Mr. Luckey. Definitely, emphatically not. It's hard, Your Honor, to apply—

THE COURT: Well, now, let me put it this way: then, your position about it is that, assuming you cannot prevail upon your theory that the Federal Government had a hand in the initial raid and that they are free of any activity in that part

—nevertheless, their subsequent search warrant was invalid and they had no authority to take it from the State policemen?

MR. CRAWFORD: That's correct, among other things. And, we have other reasons, also, which I have heretofore stated.

THE COURT: Well, I am forced to decide it. I have been listening to all of the testimony and I have reached this conclusion: that it does not make any difference in the ultimate end of this matter whether or not the F.B.I. had a valid search warrant in Mr. Sherk's possession at the time he took possession of the tapes; that if his taking possession is illegal it had to be upon some other grounds under the theory of the defendants other than the fact that he held an illegal search warrant.

MR. CRAWFORD: In other words, now, Your Honor, is definitely ruling at this time?

THE COURT: From here on out the Court will make no inquiry.

MR. CRAWFORD: In other words, I want to make sure that I understand—

THE COURT: I want you to understand it.

MR. CRAWFORD: —so that I don't further intrude upon Your Honor's ruling. I will save an exception of Your Honor's ruling, of course.

THE COURT: Yes. I want your record to be protected.

MR. CRAWFORD: *Your Honor's ruling, as I understand it, is that it will have the effect of preventing the defendants from further inquiring into the validity of the search and seizure, September 5, 1956, made by the Federal Bureau of Investigation?*

THE COURT: *No. No. That may be—under your theory that may be so permeated that it would revert back to the original time. I am merely restricting this ruling to this: That in the ultimate consideration of the matter it makes no difference whether Mr. Sherk had in his possession a search warrant issued pursuant to the Federal act or not.*

His right of possession must be based upon some other ground than that of a valid search warrant in his possession. (Emphasis supplied).

Now, that is the theory of the Government.

MR. CRAWFORD: I wonder if the Reporter would read that to me.

THE COURT: I will try once more.

MR. CRAWFORD: I will have to state sincerely to Your Honor that I was trying to understand the effect of Your Honor's ruling and what it would prevent me from attempting to do.

THE COURT: Well, for the instant it would prevent you from further inquiring as to the basis of knowledge—the basis of Mr. Sherk's knowledge or lack of knowledge in executing the affidavit for the search warrant. This Court doesn't care from here on out whether he ever executed an affidavit for a search warrant.

MR. CRAWFORD: Will the Government admit the invalidity of the search warrant?

THE COURT: No. The Government merely says that it does not make any difference whether it is invalid or valid. So, the Court will accept that theory. From here on out the Court will not concern itself with whether or not there was ever a search warrant issued upon an affidavit by Mr. Sherk."

SPECIFICATION OF ERROR NO. 2

The Court below erred in denying the motion to suppress, for the following reasons, which are briefly summarized here and are discussed and argued more fully below.

1. The Federal search warrant of September 5 was invalid, illegal and void, by virtue of the insufficiency of the affidavit of F.B.I. agent Sherk and the demonstrated insufficiency of his knowledge.

2. The State search warrant of May 17, 1956, being void, the search and seizure was illegal and evidence taken thereunder is inadmissible in a Federal criminal prosecution.

3. The state officers in conducting the illegal search and seizure in Clark's house had no real intention of enforcing State law, thus the sole object was a Federal prosecution.

4. Because of the common practice and general understand between Federal and State officials that evidence of Federal violations uncovered by State officers would be turned over to Federal officials for Federal prosecutions, the original illegality of the State search in binding upon the Federal officials and prevents admissibility.

5. The property seized from the bank under the Federal search of September 5, 1956 was in the custody of State courts and the Federal court had no jurisdiction to seize the same.

1. The Federal search and seizure was illegal:

Although Sherk was a lawyer and an F.B.I. agent with sixteen years experience, the state of his knowledge, on September 5, when he executed the affidavit for the Federal warrant, was clearly insufficient on a number of counts:

a) He had never heard four of the five tapes;

b) He had never heard the three spools of wire;

c) He had no knowledge of the manner of interception;

d) He had no knowledge of lack of consent by the participants to the conversations;

e) He had no knowledge that the tapes were designed or intended for a use which would violate the wiretap statute.

f) More than 3½ months elapsed between his hearing of a portion of one tape, and the execution of the affidavit;

g) More than 3 weeks elapsed betwen his visual inspection of tapes at the bank and his execution of the affidavit;

h) He never marked or identified the tapes, or their containers until after he seized them on September 5, 1956.

The case of *Schencks v. U. S.*, (D.C. Cir. 1924), 2 F.2d 185, lays down this governing rule:

> ". . . If the peace officer has reason to believe and does believe that a search or seizure ought to be

made, he should state in his affidavit the facts which led him to that conclusion, and which were known to him of his own knowledge. If he has no first-hand information as to the material facts, but has been informed by another as to facts or conditions which would justify the issuance of process for search or seizure, the officer should secure the informer's affidavit postively alleging of the latter's own knowledge the existence of such facts or conditions. In the event that the informer is unwilling to make such an affidavit, he should be subpoenaed to appear before the judge or commissioner to give testimony as to the truth of the statements made by him to the officer.

"Peace officers,to the credit be it said, zealously endeavor as a rule to bring lawbreakers to justice, but unfortunately they are easily satisfied as to the guilty of an accused, although having no legal evidence to convict. To permit them to search for evidence because they deposed that they had reason to believe and did believe that the law had been broken, or because they deposed that they were *informed and believed* that certain facts existed, would leave the home, the property, and the person of the citizen at the mercy of mere suspicion, and of misstatements and misinformation for which no one could be held accountable."

See also *U. S. v. Reynolds* (D.C., D.C., 1953), 111 F. Supp. 589; *U. S. v. Lassoff* (D.C. Ky., 1957), 147 F. Supp. 944; and Annotation 14 ALR 2d 605; cf. *Washington v. U. S.* (D.C. Cir., 1953), 202 F.2d 214; *Brinegar v. U. S.*, 338 U.S. 160, 93 L. Ed. 1879.

Furthermore, the only possible knowledge that affiant Sherk acquired as to the illegal character, if any, of the tapes was acquired *on May* 22, 1956 (105 days prior to the September 5th affidavit, when he heard a portion of

one tape, not all five). This, we submit, was too remote in time to constitute "probable cause." See the annotation at 162 ALR 1406, which lays down the rule that the observation of the alleged offense must not be too remote from the date of the affidavit, or else probable cause will not exist.

In *Dandrea v. U. S.* (8th Cir. 1925), 7 F.2d 861, a lapse of time from December 19, 1922—date of alleged observation—and February 1, 1923—date of affidavit—was such as to render the warrant void. If 43 days was too much, would not the time lapse here—May 22 to September 5, or 105 days, condemn the warrant?

In *U. S. v. Dziadus* (D.C., W. Va. 1923), 289 F. 837, a time lapse from August to November 1, roughly 90 days) was held to void a warrant.

The annotation mentioned, 162 ALR at pages 1414 to 1418, lists the cases where the time lapse had been considered, and concludes that less than 20 days will not void the warrant, more than 30 days will and between 20 and 30 is a "twilight zone," in which the cases go both ways.

Here, the time lapse was 105 days.

See also *U. S. v. Nichols* (D.C. Ark. 1950), 89 F. Supp. 953, where a lapse of 21 days, with other factors, was held to render the warrant void.

2. Evidence illegally obtained by state officers is inadmissible in Federal criminal prosecutions.

It has long been thought to be the rule that Federal courts would not bar evidence when it was improperly seized by State officials operating on their own, and where there was no Federal participation, cooperation and ratification. This theory is thought to stem from *Weeks v. U. S.*, 232 U.S. 383, 58 L. Ed. 652 (e.g., annotations 50 ALR 2d 531, 573; 100 L. Ed. 239). Nearly every circuit has had occasion to state such to be the rule, e.g.:

1st—Rettich v. U. S. (1936, CA 1st Mass.), 84 F.2d 118.
2nd—U. S. v. Pugliese (1945, CA 2d N.Y.), 153 F.2d 497.
3rd—Burkis v. U. S. (1932, CA 3rd N.J.), 60 F.2d 452.
4th—Wheatley v. U. S. (1946, CA 4th W. Va.), 159 F.2d 599.
5th—Grimes v. U. S. (1945, CA 5th Ga.) 234 F.2d 571.
6th—Collin v. U. S. (1956, CA 6th Tenn.), 230 F.2d 424.
7th—U. S. v. Moses (1956, CA 7th Ill.), 234 F.2d 124.
8th—Jones v. U. S. (1954, CA 8th Mo), 217 F.2d 381.
9th—Anderson v. U. S. (1956, CA 9th Nev.), 237 F.2d 118.
10th—Gallegos v. U. S. (1956 CA 10th N. Mex.), 237 F.2d 694.

Mr. Justice Frankfurter, in announcing the judgment, in his opinion which was joined by three other justices, said:

> "Where there is participation on the part of federal officers it is not necessary to consider what would

be the result of the search had been conducted entirely by State Officers."

Less than a year ago, in *Benanti v. U. S.,* 355 U.S. 86, 2 L. Ed. 2d 126, at 131, the court, in an unanimous decision, again said the question was an "open" one:

> "N. 10. *It has remained an open question* in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in Federal Court *despite the Fourth Amendment.* (See Lustig v. U. S., 338 U.S. 74." (Emphasis supplied).

Similarly, in the *Rea* case, *Rea v. U. S.* (1956), 350 U.S. 214, 100 L.Ed. 233, the Supreme Court, in enjoining a Federal agent from turning over evidence he had illegally seized, or in giving testimony, for a State prosecution, said that:

> "They (F.R.Cr.P.) are drawn for innocent and guilty alike. They prescribe standards for law enforcement. *They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings.*"

The trend thus shown and foreshadowed by *Rea, Benanti* and *Lustig* was clearly predicated from the language of the Court in *Wolf v. Colorado,* 338 U.S. 25, 93 L. Ed. 1782 (decided the same day as *Lustig*):

> "Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. *But basic rights do not become petrified as of any one time,* even though, as a matter

of human experience, some may not too rhetorically be called eternal verities. *It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing* as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

"To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of 'inclusion and exclusion.' Davidson v. New Orleans, 96 U.S. 97, 104, 24 L. Ed. 616, 619. This was the Court's insight when first called upon to consider the problem; to this insight the Court has on the whole been faithful as case after case has come before it since Davidson v. New Orleans was decided.

* * * *

"Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution."

All of the foregoing adds up to one simple fact; that the Supreme Court will not permit illegally obtained evidence to be used in Federal Courts whenever the illegality results from official excesses, Federal or State. As Justice Murphy remarked in *Lustig,* 338 U.S. at 80, 93 L. Ed. at 1824: "Whether state or federal officials did the searching is of no consequence to the defendant and it should make no difference to us." (Concurring opinion).

And see Mr. Justice Black's concurring opinion in *Wolf,* 338 U.S. 40, 93 L. Ed. 1792:

> "The Fourth Amendment was designed to protect people against unrestrained searches and seizures by sheriffs, policemen and other law enforcement officers. Such protection is an essential in a free society. And I am unable to agree that the protection of people from over-zealous or ruthless state officers is any less essential in a country of 'ordered liberty' than is the protection of people from over-zealous or ruthless federal officers. Certainly there are far more state than federal enforcement officers and their activities, up to now, have more frequently and closely touched the intimate daily lives of people than have the activities of federal officers. A state officer's 'knock on the door . . . as a prelude to a search, without authority of law,' may be, as our experience shows, just as ominous to 'ordered liberty' as though the knock were made by a federal officer."

This trend has not escaped notice, nor has it been unproductive of results. On October 2, 1958, the Court of Appeals for the District of Columbia, reversed a conviction in the District of Columbia obtained through evidence seized illegally from defendant by Maryland officers operating entirely on their own account. *Hanna*

v. U. S., — F.2d —. This Court, in overruling prior decisions in that circuit (*Shelton v. U. S.*, 169 F.2d 665) traced the "supposed" rule, and its demise under the force of the Supreme Court's language in *Wolf, Lustig* and *Benanti,* and adopted what defendants here submit is the true and proper rule:

> "Oddly, even since the Wolf decision several Court of Appeals have followed Weeks as to the admissibility of evidence obtained by state officers in federal trials on the no longer tenable theory that the Constitution does not prohibit unreasonable searches and seizures by state officers. E.G., Serio v. United States, 5th Cir. 1953, 203 F.2d 576, 578, cert. denied, 346 U.S. 887; United States v. Moses, 7th Cir. 1956, 234 F.2d 124, 125; Gallegos v. United States, 10th Cir. 1956, 237 F.2d 694, 696. Overlooking the fact that since the Wolf case an unreasonable state seizure must be recognized as a violation of the Constitution, these courts have failed to come to grips with the problem whether there should be in the federal courts a comprehensive rule that evidence obtained by invasion of a constitutional right, whether by a state or a federal officer, is inadmissible. Cf. Jones v. United States, 8th Cir. 1954, 217 F.2d 381.
>
> * * *
>
> "In cumulative effect these several pronouncements by so many Justices of the present Court support the rational argument that the Weeks and the Wolf decisions, considered together, make all evidence obtained by unconstitutional search and seizure unacceptable in federal courts. At very least it seems clear that this is a position toward which several Justices are strongly inclined, with one Justice apparently in disagreement and others indicating no more than that they regard the question as open. Certainly, neither the Weeks holding as to state seized evidence nor our own Shelton decision can properly be regarded as binding precedents

in the light of the subsequent Wolf ruling and the cited indications of the present views of so many justices.

"On principle and as a matter of sound policy in the administration of judicial proceedings in the District of Columbia we think all evidence obtained by violation of the Constitution should be excluded. * * *

* * *

"This concern with the integrity of the judicial process must be most serious when the evidence has been obtained by a violation of the Constitution itself. The effectiveness of courts must always depend in large measure upon the respect which their processes command by reason of the integrity they reveal. From that point of view the courts of the United States, the ultimate guardians of the Constitution, cannot afford to play the 'ignoble part' by themselves permitting the use of unconstitutionally obtained evidence, solacing and absolving themselves by deploring the unconstitutional seizure and pointing out that in some other proceeding sanctions can or should be imposed against the violation of our fundamental law. This very point was made in the Weeks case with reference to evidence which federal officers had obtained by unreasonable search:

> 'The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.' 232 U.S. at 392.

But the Wolf case has made this reasoning equally applicable to the now equally unconstitutional seizures by state officers.

"Beyond the issue of judicial integrity, we should not assume that the refusal of the federal courts to permit the use of improperly obtained evidence will have no effect in persuading state as well as federal officers to follow constitutional methods and procedures in obtaining evidence. In the Weeks case the Supreme Court went so far as to say that if articles can be seized illegally by federal officers 'and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.' It cannot rationally be argued that the constitutional protection is so gravely impaired by using such evidence in federal courts when a federal officer has violated the Fourth Amendment, but that there is no significant impairment when it is a state officer who has been guilty of an equivalent violation of the Fourteenth Amendment. Perhaps the sanction of excluding such evidence from federal trials has a greater deterrent effect upon federal officers than upon state officers. But there is no calculus to measure such a difference, nor is it the kind of difference which warrants opposite conclusions as to the admissibility of the evidence."

The State search was condemned unequivocally as grossly violative of defendants' rights by two Oregon Courts directly (Tr. of Rec. 61 and 70); the Government, in the hearing on the motion to suppress, conceded for purposes of the motion, the illegality of the State search (M.S. 84). The Federal trial judge more than once expressed his opinion that the State search was illegal. Finally, a third Oregon court, Circuit Judge Redding, in enjoining State officials from testifying as to the search and its effects called the search an

"abuse of the State Courts' own process" (Def. Motion for Stay, Ex. A).

It is, therefore, submitted that this conviction should be reversed, for the reason that it was obtained with and based on illegally-obtained evidence in violation of defendants' rights under the Fourth and Fifth Amendments.

3. Where state officers illegally seized evidence solely for the purpose of enforcing state law, such evidence is inadmissible in Federal court.

Two things are clear, here, *first,* the state search of May 17, 1956, was so flagrantly illegal from the inception that, though they disclaimed such at the hearing, the District Attorney and his chief deputy must have known that no state prosecution would be had, and hence they must have contemplated a Federal prosecution. The affidavit for the state search was based solely on "information and belief" (Tr. of Rec. 59-60) which District Attorney Langley testified he gained in the following fashion (M.S. 45-49):

> "And, Mr. Brad Williams called Mr. Herder on the phone and I listened to Mr. Herder's conversation in which he said that he knew Raymond Clark; that Raymond Clark was in the business.
>
> THE COURT: Well, you understand this is all hearsay, Mr. Langley, and the only purpose is that following this conversation you made this affidavit, is that right?
>
> THE WITNESS: That's correct.
>
> THE COURT: All right.
>
> THE WITNESS: Now, Mr. Herder said that he knew Mr. Clark and that Mr. Clark was in the business of leasing and renting these moving pictures

to male stag parties and that these moving pictures were in—were kept in Clark's house.

Now, based upon that information I made this affidavit on information and belief upon my firm conviction which I still have, that information furnished by a police officer on information—and which, I may—on information and belief establishes probable cause which is the basis for a legal search warrant.

MR. CRAWFORD: Q. And, you further state in your affidavit that 'certain obscene and indecent photographs with accompanying sound recordings, with intent on the part of said Raymond Clark to exhibit said photographs' were at that address. Is that true?

A. That's correct.

Q. Now, then, who did you get that from, Mr. Herder?

A. Yes.

Q. He told you?

A. He told me that Clark was in the business of renting to male—

THE COURT: You told us that, that he gave you this address.

THE WITNESS: Pardon me. He told me—he understood they were in Clark's house.

THE COURT: All right.

MR. CRAWFORD: Q. In Clark's house?

A. That's correct.

Q. And that he was in the business of renting these indecent pictures, is that correct?

A. That Clark was. Herder wasn't.

Q. That Clark was. Yes. Now, you're sure that Mr. Herder told you that?

A. Well, I am not repeating anything I am not sure about, counsel.

Q. Oh. Fine. All right. Now, the next paragraph —view the second paragraph if you will direct your attention to that, Mr. Langley. Now, you will notice that the next paragraph of the affidavit specifically states that that paragraph is on information and

belief. Will you please read the second paragraph to yourself?

(Whereupon the witness did as requested)

MR. CRAWFORD:Q. You have read that?

A. Yes, sir.

Q. Now, did you mean to—at the time that you executed this affidavit that the second paragraph was on information and belief, or was it made of your own knowledge?

A. So far as this affidavit is concerned all the information contained on it was made on information and belief.

Q. And, does that apply to the second paragraph?

A. It applies to the entire affidavit.

Q. Fine. I direct your attention to the third paragraph 'I further depose and say that the source of my information is Chief of Police Herder of St. Helens, Oregon.' Is that made on information and belief?

A. No sir; he told me that himself.

Q. He told you that himself, is that correct?

A. That's correct.

Q. Do you know Mr. Herder?

A. No, I do not.

Q. Have you ever seen him before this date?

A. I wouldn't be able to say about that, counsel.

Q. Do you know that the man you were talking to was Herder?

A. Well, he said so. He is the Chief of Police at St. Helens.

Q. And he told that to you?

A. Well, he said it on the telephone.

Q. Well, did he tell it to you?

A. I heard it.

Q. Well, was Mr. Herder talking to you?

A. I heard it, counsel.

Q. No. Please answer my question.

A. I am giving you the best answer I can.

Q. Was Mr. Herder talking to you?

A. The man who talked to me identified him-

self as Mr. Herder as being the Chief of Police of St. Helens.

Q. Now, just so there will be no misunderstanding, Mr. Langley, you understand that what is meant by a conversation between two people on a telephone? Do you understand that?

A. I think so.

Q. Now, were you and Mr. Herder talking together on a telephone?

A. Counsel, I have explained that the best I can that Mr. Williams called Mr. Herder on the telephone and I overheard the conversation.

Q. How did you overhear it?

A. Well, I was listening on another extension.

Q. You were listening on an extension line?

A. That's correct.

Q. Did Mr. Herder know that you were listening?

A. No. But Mr. Williams did.

Q. Mr. Williams did?

A. Correct.

Q. But, Mr. Herder, when he gave this information that you say he gave, didn't know that you were on the extension?

A. Well, of course, you have to ask him that. In my opinion, I don't think he knew." (M.S. 49).

Chief Herder took the stand and denied that this conversation *ever* took place (M.S. 82); further he swore that his (Herder's) prior conversation with Williams was "hearsay" and that he "definitely did make it plain to Mr. Williams" that it was hearsay (M.S. 83).

This affidavit was so flagrantly illegal that it is clear that the moving spirits—the District Attorney and his deputy—had no real pretense in enforcing state law. Their repeated suggestions of a Federal violation, and the hectic way they sought it, are further indication of their real purpose—a Federal prosecution.

Furthermore, though both Langley and his deputy claimed they were seeking a state violation (M.S. 67-68, 376), it is now clear that there could be no state prosecution under the state wiretap law, for the reason that Sec. 605, the Federal statute, has "pre-empted" the field; *Benanti v. U. S.*, 355 U.S. 96, 2 L. Ed. 2d 126 (December 9, 1957).

Thus the *Gambino* rule is here applicable, *Gambino v. U. S.*, 275 U.S. 310. Consequently, denial of defendants' motion to suppress was error.

4. The motion to suppress should have been granted because of the common practice and general understanding between Federal and State officials.

A virtually unbroken string of Federal and State law enforcement officials testified that in the Oregon area a "common practice and general understanding" existed by which evidence and information obtained by state officers would be turned over to federal officers for prosecution purposes (M.S. 126-8, 164-6, 433 and 443-4), and vice versa (M.S. 327).

Such "general understanding and common practice" that the Federal officers will adopt and prosecute offenses renders the results of the state seizure inadmissible in Federal criminal prosecutions. *U. S. v. Butler,* 10th Cir., 1946, 156 F.2d 897; *Fowler v. U. S.*, 62 F.2d 656; *Sutherland v. U. S.*, 92 F.2d 305; and *Lowery v. U. S.*, 128 F.2d 477.

Hence the Motion to Suppress should have been granted, and it was error for the Court below to deny it.

5. The Federal court had no jurisdiction to seize the evidence under the Federal search warrant of September 5, 1956, because the same were in custodia legis.

The United States Commissioner, in issuing the Federal search warrant of September 5, 1956 (Tr. of Rec. 7-8), was simply an "arm of the court," *Todd v. U. S.* (1895), 158 U.S. 278, 39 L. Ed. 982; *U. S. v. Berry,* 4 F. 779. Consequently, the Federal Court undertook to take possession then in the property of the State Courts.

The Supreme Court said, in *Fischer v. American Ins. Co.* (1942), 314 U.S. 549, 86 L. Ed. 444:

> ". . . the *federal court may not 'seize and control the property which is in the possession of the state court'* nor interfere with the state court or its function." (Emphasis supplied).

And the court described, as a well-settled principle" the following:

> "Where a court of competent jurisdiction has by appropriate proceedings taken property into its possession through its officer, the property is thereby withdrawn from the jurisdiction of all other courts. *Such possession of the res by the State court disenabled the federal court from exercising any control over it."* (Emphasis supplied).

And for another statement of the rule, see the case of *Lion Bonding Co. v. Karatz* (1922), 262 U.S. 77, 67 L. Ed. 871, at 880, wherein it is said:

> "Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officer, the property is thereby withdrawn from the jurisdiction of all other courts. (Citing cases). Possession of the *res* disables other courts of coordinate jurisdiction from exercising any

power over it. (Citing cases). The court which first acquired jurisdiction through possession of the property is vested, while it holds possession, with the power to hear and determine all controversies related thereto. It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit another court to interfere with such possession and jurisdiction." (Emphasis supplied).

And see *Ponzi v. Fessenden* (1922), 258 U.S. 254, 66 L. Ed. 607.

"We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfill their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two system are maintained are deeply interested that *each system shall be effective and unhindered in its vindication of its own laws.* The situation requires therefore not only definite rules fixing the powers of the court in cases of jurisdiction over the same persons and things in actual litigation but also a spirit of comity and mutual assistance to promote due and orderly procedure.

* * * *

"The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy to attain which it assumed control, before the other court shall attempt to take it for its purpose. The principle is stated by Mr. Justice Mathews in Covell v. Heyman, 111 U.S. 176, 28 L. Ed. 390, 4 Sup. Ct. 355, as follows:

'The forbearance, which courts of coordinate jurisdiction, administered under a single sys-

> tem exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is the principle of comity with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. *It is a principle of right and law, and therefore, of necessity.* It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and *when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the juridicial power of the other, as if it had been carried physically into a different territorial sovereignty.'"* (Emphasis supplied).

See also *U. S. v. Monjar* (1946), 154 F.2d 954; *Daeufer Brewing Co. v. U. S.* (1925, 3rd Cir.), 8 F.2d 1; *Pappas v. Lufkin,* 17 F.2d 988; *Jennings v. Buterbaugh* (1950, D.C., Pa.), 89 F. Supp. 553.

Hence, though two state courts suppressed the seized items as evidence, they did not return them to the defendants, but rather retained custody of them (Rec. p. 65, pp. 57-70).

The court, having no jurisdiction over the seized evidence, ought to have sustained defendants' Motion to Suppress.

SPECIFICATION OF ERROR NO. 3

The lower court's action in denying, on March 20, 1957, defendants' request for a 90 day postponement and allowing only a 20 day postponement (from March 26 to April 16, 1957) and the court's action on April 15, 1957, in denying completely defendants' request for a 30 day postponement, constituted error in that it resulted in a denial to defendants of due process under Amendment V and a denial of right to counsel under Amendment VI of the U. S. Constitution.

Statement of Pertinent Facts on Motion for Continuance

Defendants herein contend that they and each of them were deprived of their right to due process under the Fifth Amendment and to assistance of counsel under the Sixth Amendment by virtue of the manner in which they were forced to trial in this case. A reference to the affidavits filed in support of Motion for Continuance, and the Supplemental Motion for Continuance, *none of which* affidavits were denied or contradicted in any way whatsoever, together with the testimony of defendant Elkins found at pages 30 to 40 of the transcript of motion for continuance shows the following (Rec. Nos. 6, 7, 8 and 9, pp. 24-38; Nos. 24-26, pp. 88-103):

1) Indictment was returned February 4, 1957.

2) Defendants arrested and released on bail February 6, 1957.

3) Defendants arraigned February 18, 1957, pleas of "not guilty" entered, the court allowing 30 days within

which to file motions; (defendant Elkins' attorney being Mr. Hannon and defendant Clark being represented by Attorneys Crawford and Fallgren); defendants' time from February 6 to February 18 being completely occupied in consultation with Staff members of the McClellant Committee, conference with the staff of Oregon Attorney General, then engaged in the Portland vice expose, and with appearances before the State Grand Jury investigating the vice expose.

4) Defendants, under subpoena by the McClellan Rackets Committee, left for Washington, D. C. on February 20, 1957.

5) On March 2, by Minute Entry, case set for trial March 26, 1957.

5(a) Defendant Elkins, on March 11, 1957, employed attorneys Crawford and Fallgren, Attorney Hannon having withdrawn.

6) Defendants in Washington, D. C. continuously from February 20th to March 16, 1957, testifying before or consulting with the staff of the McClellan Committee; (save for a period of about 60 hours from March 2 to 4, when defendant Elkins flew to Portland for an appearance before the State Grand Jury and then flew back to Washington, D. C., not being able, however, to spend any time at all on this trip with his attorney).

7) Defendants, having finished their McClellan Committee appearances, returned to Portland late March 16 or early March 17, 1957.

8) On March 18th, defendants, through their at-

torneys, Crawford and Fallgren, filed a motion for continuance of 90 days based upon two grounds, (1) lack of time to prepare, and (2) prejudicial publicity each preventing a fair trial; this motion was heard on March 20, 1957, at which time the lower court agreed that he was "quite of the opinion that counsel *has not had adequate time nor the parties have had an adequate time within which to prepare* for trial so far as the March 26th trial date is concerned." (Emphasis supplied). Instead of allowing the 90 days requested by the defendants, the Court allowed a continuance of only 21 days, or from the 26th of March to the 16th of April, 1957, in the trial date. (It should be noted that considerable time was used preparing the Motion for Continuance, which was lengthy, and was accompanied by a bulky file of newspapers and magazines.)

9) Counsel for defendants prepared and filed on March 19, 1957, Motion for Discovery under Rule 16 or the Federal Rules for Chriminal Procedure seeking a right to inspect and copy tape recordings in the plaintiff's possession.

10) On March 19, defendants filed a seven-part Motion to Dismiss the Indictment, supplemented by a Supplemental Motion to Dismiss on March 29th, these Motions being argued on March 29 and April 9, 1957.

11) On March 25, 1957, defendants filed a Motion to Suppress the illegally seized tape recordings as evidence, together with an affidavit (containing exhibits) in support thereof, plus twenty-three page memorandum of points and authorities relating to the Motion to Suppress.

12) On April 3, 1957, defendants caused to be served subpoena duces tecum upon FBI agents in Portland, and after plaintiff's motion to quash was filed, an amended subpoena duces tecum was served on April 8, 1957, to which also, plaintiff filed a motion to quash.

13) On April 9, 1957, counsel argued the Supplemental Motion to Dismiss, and immediately thereafter, argued the Motion to Quash the Subpoenas Duces Tecum; immediately thereafter, on April 9th, defendants commenced the taking of testimony in support of their Motion to Supress. This consumed the balance of the 9th, all day 10th, April 11th and April 12; at the end of which, the Court denied the Motion to Suppress.

14) On April 11th and again on April 12th, in the evening thereof, defendant Elkins having become "concerned that the task of adequately preparing and presenting the various preliminary motion and matters in the case was so time consuming that other counsel would be needed to adequately prepare for the trial on the merits of this case, for the reason that the serious preliminary matters had occupied all of the time of my then attorneys that normally would be available for the preparation of the defense to the trial" (affidavit of defendant Elkins (Rec. 24, p. 94), substituted Walter H. Evans, Jr. as his attorney, Crawford and Fallgren continuing on as attorneys for defendant Clark.

15) April 13, 1957, a Motion for 30-day Continuance was made on behalf of defendants (together with supporting affidavits and exhibits) based on lack of time for preparation and upon continuing vicious, flamboyant and prejudicial newspaper publicity against defendants.

16) On April 13, 1957, defendant filed, in State Court, a suit to enjoin state officers from testifying in federal court with respect to items seized in the illegal raid committed by state officers on defendant Clark's house, based in part upon the *Rea* doctrine (— U.S. —, 100 L. Ed. 233).

17) On April 15, 1957, defendants introduced testimony on and argued their Motion for a 30 day Continuance, which Motion was denied.

18) On April 15, 1957, at 2:00 o'clock P.M., defendants' counsel argued in State Court the question of injunction against the state officers.

19) On April 16, 1957, the trial commenced with defendants being forced to pick a jury from a panel which had just heard a twenty-four page discussion by the District Judge of the Restraining Order and some of the facts and testimony concerning the tape recordings which had been given by witnesses at the hearing on the motion to suppress (Tr. 11 to 14), despite defendants' timely request for a new panel which had not heard such remarks (Tr. 2 to 26, 26 to 28).

20) After a jury had been selected and sealed, the court then went into the discovery proceeding involving the listening to and making copies of the tapes upon which the government intended to rely at the time of the prosecution (Tr. 73-80).

21) April 18, 1957, the discovery proceedings were undertaken (time 11:45 P.M.) which lasted for a period of two days, through the 18th and 19th, the trial

itself commencing at 9:30 A.M., on Saturday, April 20, and continued on until 4:00 o'clock that afternoon (Tr. 100-232).

22) On April 21 after having prepared the lengthy and complicated documents necessary to apply to the Court of Appeals for the Ninth Circuit, for a Writ of Prohibition, counsel for defendants, flew to San Francisco from Portland and there argued the matter orally before the court.

ARGUMENT

It is respectfully submitted that none of the various motions and other preliminary matters were frivolous nor did they smack of delay. Indeed, it is submitted that the peculiar nature of this case affirmatively shows that each preliminary matter was serious and meritorious.

The motion to dismiss, for example, was lengthy and involved, simply because the wiretap statute, for purposes of criminal prosecutions thereunder, was and is a new statute, with few interpretive decisions construing it, thus making legal research on analogous principles lengthy and time consuming. The motion to suppress was lengthy and time consuming because defendants called sixteen witnesses, many hostile to defendants. Yet occupation of counsels' time in handling the preliminary motions and matters is just as effective in preventing any opportunity for preparation of the defense on the merits as would be absence from the state or other disability on the part of both defendants and their counsel.

The foregoing recital, alone, is so demonstrative of a denial of right to the effective assistance of counsel that it seems clearly to be a work of superrogation to argue the matter herein or to cite cases. But, briefly, we desire to call certain matters to this Court's attention.

It must be remembered that of a total of 60 days from arrest to trial, defendants each spent 25 days in Washington, D. C. actively assisting the government, which, through its legislative arm, was then commencing an important inquiry into racketeering and corruption in the labor and management field. Of the 13 days from arrest to leaving under subpoena for Washington, defendants were engaged "continuously" and their time was "completely occupied" with consultation, with staff members of the Attorney General's office and with the Grand jury. Of the 30 days between the time defendants returned from Washington, D. C. and the time of trial, four days were spent in court on the Motion to Suppress; portions of two other days were spent in court on other motions, and of the remaining 24 days, more than half were spent assisting the State of Oregon in its efforts to prosecute the indictments which arose out of the exposures by these two defendants (see M.C. 34-36, 39). Being forced to trial with such limited amount of time for consultation with attorneys and interviewing of witnesses simply does not constitute a fair opportunity to defend.

> "Whether the time allowed counsel for a defendant for preparation for trial is sufficient will depend upon the nature of the charge, the issues presented, counsel's familiarity with the applicable law and

the pertinent facts, and the availability of material witnesses." *Ray v. U. S.*, 8 Cir. 1952, 197 F.2d 268.

It needs no citation for the rule that the granting or refusing of a continuance rests largely in the discretion of the trial court, but:

> "The discretion of the court as to continuance is not absolute, however; . . . it should not be exercised arbitrarily or capriciously, nor in disregard of the fundamental rights of the accused; *it does not authorize the court to refuse a continuance when the circumstances disclose a condition of affairs showing that justice to accused entitles him to a postponement of his trial,* and a continuance should always be granted on a sufficient showing." (Emphasis supplied). 22 C.J.S. 471, Cr. Law, § 482.

It is respectfully submitted that it is a denial of a right to a fair trial and therefore a denial of due process, and a denial of effective right to counsel for the Court to have denied defendants' requests for a continuance. Defendants believe the Court's discretion in this matter was exercised "in disregard of the fundamental rights of the accused," and that justice and fair play call for a reversal on this ground.

With respect to the other basis for the motion to continue, namely, the damaging and prejudicial pre-trial publicity which was widespread in the Portland and Oregon area and also widespread throughout the United States, as is shown by the great and bulky exhibits of local papers and of nationwide news and picture magazines, such as Time, Life and Newsweek, it is clear that this case is nearly on all fours with the Delaney case, *Delaney v. U. S.* (1st Cir. 1952), 199 F.2d 107, in

which the conviction was reversed and the case was remanded for a new trial because of the failure of the trial court to grant a motion for continuance. In the Delaney case, the defendant was prosecuted for income tax violations allegedly committed by him as collector of internal revenue for the District of Massachusetts. He was suspended in June of 1951 for alleged irregularities in his office, removed from office by the President in July and on September 14, 1951, was indicted by the grand jury. At the time there was a congressional committee, the so-called King Committee, functioning and although Delaney's counsel sought to have the committee investigation of Delaney's matters postponed, this was unavailing, and on October 16, 1951, the King Committee commenced public hearings in Washington, D. C. focusing upon the alleged derelictions of the defendants. Many of the witnesses who had testified before the grand jury also testified before the committee. On November 15, the defendant filed a motion for a general continuance which was denied, the trial court setting the trial date for December 3, 1951 and then, on November 29, 1951, Delaney moved for a continuance for a "reasonable period of time" whereupon the court postponed the trial from December 3, 1951 to January 3, 1952. On January 3, 1952, the defendant moved for another continuance for a reasonable period of time which motion was denied and he was forced to trial and shortly thereafter was convicted. The First Circuit, in reversing upon this ground, had this to say:

> "No doubt the district judge conscientiously did all he could, both in questions he addressed to the

> jurors at the time of their selection and in cautionary remarks in his charge to the jury, to minimize the effect of this damaging publicity, and to insure that defendant's guilt or innocence would be determined solely on the basis of the evidence produced at the trial. But as stated by Mr. Justice Jackson, concurring, in Krulewitch vs. U. S., 336 U.S. 440, 453, 93 L. Ed. 790: 'the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . and practicing lawyers know to be unmitigated fiction.' . . . One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidenly exclude even the unconscious influence of his pre-conceptions as to probable guilt, engendered by a pervasive pre-trial publicity. This is particularly true in the determination of issues involving the credibility of witnesses."

A resort to the exhibits in the case at bar which were filed by defendants in support of their various motions for continuance, and particularly the shameful and reprehensible publications of one paper which continually harped upon alleged predelictions of defendants to narcotics and prostitution rackets, and in particular commenced an inflamatory daily series of articles about five days before the trial was to commence, shows clearly that the average juror was in no way able to exclude any unconscious influences of his pre-conception as to probable guilt engendered by this pervasive pre-trial publicity. It is submitted that the court committed reversible error in denying defendants' motions for continuance. As was said by the court in the Delaney case:

> "This is not a case of pre-trial publicity of damaging material, tending to indicate the guilt of a defendant dug up by the initiative and private

> enterprise of newspapers. Here the United States, through its legislative department, *by means of an open committee hearing held shortly before the trial of a pending indictment caused and stimulated this massive pre-trial publicity, on a nationwide scale. Some of this evidence was indicative of Delaney's guilt of the offenses charged in the indictment. Some of the damaging evidence would not be admissible at the forthcoming trial, because it related to alleged criminal derelictions* and official misconduct *outside the scope of the charges in the indictment*. None of the testimony of the witnesses heard at the committee hearing ran the gauntle of defense cross examination. Nor was the published evidence tempered, challenged or minimized by evidence offered by th accused." (Emphasis supplied).

While this state of facts in the Delaney case is not precisely on all fours, we believe the similarity is readily apparent. As will be seen from the exhibits offered, the McClellan Committee held hearings on the Portland phase of its investigation from about February 25, 1957 to about March 14, 1957. Several witnesses before the committee, who had been accused by defendant Elkins in his testimony of racketeering or derelictions of duty, were extremely vicious and prejudicial in their responses and in their attempt to bring before the committee charges that defendant Elkins was connected with narcotics and prostitution, etc., all of which clearly were designed to smear Elkins before the public and the world. As will be seen from the exhibits, one of the newspapers in the Portland area did its best to give extremely wide currency to the allegations of alleged connections with narcotics and prostitution.

Consequently, as the court said in the Delaney case, at page 114:

> "*We think that the United States is put to a choice in this matter*: if the United States through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then *the United States must accept the consequences that the judicial department,* charged with the duty of assuring the defendant a fair trial before an impartial jury, *may find it necessary to postpone the trial until by lapse of time, the danger of the prejudice may reasonable be thought to have been substantially removed.*" (Emphasis supplied).

It is no answer either to suggest that merely because defendant Elkins in particular was thought by the committee to be a "favorable" witness, and even indeed, was described by Senate McClellan as performing a "patriotic duty" in his testimony before the committee, that the damaging effect of the prejudicial publicity was lessened. Even though there were elements to this widespread publicity which tended to react favorably upon defendant Elkins, there were equally widespread aspects to the publicity which was highly damaging and highly prejudicial. Among such was the litany of allegations accusing Elkins and Clark of connections with prostitution and narcotics. And, we suggest, merely because some of the publicity might be thought to have been favorable to the defendant would not remove from the juror's minds the harmful effects of the prejudicial publicity, nor would it permit an atmosphere in which the trial could be conducted so as to be truly free and

impartial as to both parties—to permit fair play and due process of law to these defendants.

The only apparent solution would have been for the court to have granted such a continuance as would have been reasonable, and it is submitted that the defendants' requests were reasonable, the first being for a 90-days (from March 18,1956) and the second for only a 30-days.

It is difficult to pinpoint, in the record, prejudice resulting from the Court's ruling. We can only point out that defendant Elkins' counsel was required to commence trial of this case on four days' notice during part of which time he was engaged in the preparation of the state court injunction suit and arguments thereon, and defendant Clark's attorneys were required to commence when they had been almost continuously engaged in the various motions and other preliminary matters. The Government's case required 29 witnesses and more than 60 exhibits were involved. Should an additional showing of prejudice be required in a case of this complexity?

We believe that the Delaney case is controlling in this respect, and that the lower court erred in failing to exercise its discretion by granting the defendants' motion for continuance, and for this reason we respectfully submit that the conviction should be reversed.

STATEMENT OF FACTS ON THE ASSIGNMENT OF ERRORS RELATING TO THE TRIAL

(All references herein are to page numbers of the Transcript of Proceedings, Volumes I to XV.)

After the jury was selected, the Court permitted defendants to employ a technician to make a copy of the tapes at the same time the tapes were being played for the Court. It was decided to hear them in camera on the first occasion and the F.B.I. agent made preliminary identification of the tapes (Tr. 104), and defendants and their counsel then heard the tapes for the first time. This commenced the afternoon of April 18th (Tr. 109-111) and continued with an evening session until 11:45 p.m., recessed until the morning of the 19th, and concluded at 5:15 p.m. April 19th (Tr. 158). The opening statement by the Government was made the following morning (Tr. 160), and defendants requested and were granted permission to reserve their opening statement until the close of the Government's case (Tr. 160, 161), and the testimony commenced.

The Government's testimony developed in the following manner, though not in the following order. F.B.I. agent Sherk identified Government's Exhibits 1 to 5 and the sub-lettered exhibits thereof as being the five reels of tape, their boxes, and the various slips of paper accompaning them, that were seized by him pursuant to the Federal search warrant at the First State Bank of Milwaukie (Tr. 165). He further testified that he had heard part of one of them the afternoon of May

22nd in the Multnomah County Sheriff's office (Tr. 180). Mr. Minielly, the Deputy Sheriff in charge of the raid on the Clark home, testified as to his finding five boxes (spools) of tape in a hassock at the Clark home, taking them down to the basement first where he initialed the boxes, then taking them out to his car where he locked them up, then delivering them to Sheriff Schrunk at the Sheriff's office in the County Court House (Tr. 579, 610). He explained the various discrepancies between his testimony and the receipt given by him the night of the raid and the return made into court, and explained about his "custody" of the tapes during the time they were going to the District Attorney's office, to the Grand Jury, to District Court, and back again (Tr. 629, 633). He also testified that as far as he knew they were missing for a period of from 12 to 24 hours (Tr. 736).

Terry Schrunk, the then Sheriff and present Mayor of the City of Portland, testified as to his receipt of the State search warrant, his delivering it to the Deputy outside the television station, and his later call to the scene of the raid after it was in progress. He explained his early morning listening to the tapes and his arranging for copies of *excerpts* of the tapes to be made (Tr. 902; but see 942 and 1883), by explaining that he wanted to "preserve the evidence" (Tr. 903) and that therefore these copies of excerpts were given to the newspapers reporters (Tr. 908).

Oscar Howlett, a deputy district attorney, testified as to his "custody" of the tapes during the time he

played them for the Grand Jury while the State court hearings on the motion to suppress was in progress (Tr. 1097, 1118).

The witness, Howard R. Lonergan, a member of the Bar and Chief Criminal Deputy under Mr. Langley, testified as to his custody of the tapes, and that when the witness Minielly was looking for the tapes and told him Judge Mears wanted them produced in court, that he "deliberately made a misstatement of fact" (Tr. 1167, 1187, 1188) to the witness Minielly, knowing that the witness Minielly was going to report it to the Court, to the effect that the tapes were not in the District Attorney's safe and could not be found, when in fact he, the witness Lonergan, saw them in the safe (Tr. 1188).

Claude Cross, a lieutenant in the State Police testified as to hearing the tapes and seeing them copied by Crosby (Tr. 1202-3) and to being present when the tapes were turned over to Sheriff Schrunk by the Attorney General, Mr. Thornton, pursuant to order of the District Court and as to the witness' subsequent placing of them in a safe deposit box in the bank at Milwaukie and that only he and Captain Gurdane had access to the box and he explained the circumstances surrounding his various entries into the box as did the witness Gurdane (Tr. 1244). Gurdane further testified as to the execution of the Federal search warrant (Tr. 1248). The witness Darby was a State policeman who also played the tapes while in the custody of the State Police (Tr. 1270). Mr. Franz from the First State Bank at Milwaukie testified as to the limited access to the

safe deposit box and that he was present when the F.B.I. executed its search warrant (Tr. 1822-5).

The witness Buell, a radio technician employed by the Oregon Journal radio station, handled one of the reels of tape on May 22nd when he spent about four hours untangling it (Tr. 1831-2).

Mr. Novak, a "disc jockey" was called by the Oregon Journal reporter, Brad Williams, to make copies of the tapes in the early morning hours of May 19th, the day after election day. That he made "about eight half-hour reels" (or a total of four hours of recordings) (Tr. 855) and left with the Journal reporter about 6:30 or 7:00 the next morning (Tr. 1854, 1857); that he made further copies of the copies at his radio station (Tr. 1860, 1861).

Charles Moore, another radio technician from the Oregon Journal radio station KPOJ, testified that in the late evening and early morning of May 17th-May 18th, he was directed to go to the Sheriff's office where he was met by two Journal reporters and that under direction of the Sheriff he made copies of excerpts of the tape (Tr. 1883).

The Government also called Dorothea Anderson, the secretary to the then District Attorney, Mr. Langley, who testified as to playing some of the tapes in the District Attorney's office.

All of the foregoing witnesses testified that there was no alteration made to the tapes while they were in the possession or custody of the witness so testifying.

Upon this chain of custody, the Government offered and the Court received Government's Exhibits 1 to 5 (the offer was renewed at Tr. 1903 and the exhibits were received at page 1937).

With respect to identifying the conversations, the Government called witness Maloney who identified numerous of the conversations, and Mrs. Anderson (Tr. 1289), former District Attorney Langley (Tr. 1494), and Thomas Sheridan, former Oregon Liquor Control Commission administrator (Tr. 1746), each of whom identified certain conversations as being telephone conversations in which the witness was a participant, and that they were actual telephone conversations, and in each instance the witnesses testified that they had not consented to the conversation's being intercepted, recorded, divulged or used by another.

With respect to the slips of paper constituting the sublettered Exhibits 1 to 5, the Government called Thelma McCulloch who identified defendant Clark's signature on certain bank records (Exhibits 22, 23 and 24) (Tr. 978), Harold Ennor, a license inspector for the City of Portland who identified Exhibit 25 as a license application in the name of Ray Clark, but could not identify the signature or other writing on the exhibit (Tr. 991); the witnesses Ross and Kelleher, who identified Government's Exhibits 26 and 27 as being business records from their taxicab concerns in the name of Raymond F. Clark, but who could not identify the signature or handwriting in the exhibits (Tr. 998, 1004).

The Government then called F.B.I. agent Durley B. Davis, a handwriting expert, qualified him, and, over defendants' objection, permitted the witness to give the opinion that the handwriting on the sublettered exhibits 1 to 5 (i.e., the slips found with the reels) was the same as that on the bank records, Exhibit 22, subletters (which had been identified and received), and with the license application and cab records (Government's Exhibits 24 to 27, inclusive, which had not been received in evidence) (Tr. 1013 to 1032), and thereafter received Exhibits 25, 26 and 27 into evidence (Tr. 1037). Mr. Davis then identified certain enlargements of the exhibits and explained his opinion to the jury stating positively that in his opinion the Government Exhibits 1 to 5, sublettered, i.e. the slips, were written by the same person who signed "Raymond F. Clark" on the bank records and the other records. (We parenthetically observe that if there was a proper foundation laid for Mr. Davis' testimony, in our opinion, it was sufficient to enable the jury to find that defendant Clark was the person who had written the slips found with Exhibits 1 to 5.)

With respect to "divulgence"and "use," the Government called three witnesses, the District Attorney, Mr. Langley, his wife, Janice Langley, and Clyde Crosby, an International Representative of the Teamsters Union. Mr. Langley testified that the defendant Elkins came to his house in late October, 1955 (with a gun in his pocket) and handed Langley what purported to be a typewritten transcript of certain telephone conversations and that on this typewritten transcript were certain of

those Langley had heard played during this particular trial and that Elkins then tried, by inference, to blackmail him for $10,000 (Tr. 1418). That although Langley was then District Attorney he did not notify state or city police nor the sheriff, and that although he also knew the defendant Elkins was an ex-convict and that the carrying of a gun by him would have been an offense, that he made no effort to have him arrested (Tr. 1515-1516).

Mrs. Langley testified that on the occasion referred to by her husband she saw Mr. Elkins come in and hand her husband some papers and that her husband was mad or disgusted after Elkins left (Tr. 2393). She further testified that on the following day, a Monday, the defendant came to her house unannounced, walked in (when she opened the door) carrying a tape recorder, and played some tapes for her and then said that for $10,000.00 he would leave the tapes for Mrs. Langley (Tr. 2397); that she recognized some of the conversations she heard on that day as being some of those heard in court; that on the recordings she heard a telephone bell, that it sounded like a "ting-a-ling-a-ling" rather than a "buzz-buzz" sound (Tr. 2439); that she saw no gun and that when she left the room Elkins left the house (Tr. 2443).

The witness Crosby testified that in the fall of 1955 Elkins brought out his tape recorder to Crosby's house and they retired to Crosby's basement where they spent several hours listening to tapes (Tr. 2179-2183) and that Elkins said the tapes were damaging to "Teamster officials" and that he, Elkins, had paid $10,000.00 to

have them "burglarized" (Tr. 2183). The witness then listened to Government's Exhibits 1 to 5 and testified that there were approximately 11 of the conversations recorded thereon which he had heard in his basement on the day in question (Tr. 2187 to 2197).

The Court, over objection from defendants (Tr. 2199, 2200) (ruling at 2201), permitted the witness to testify to two other telephone conversations he heard in his basement, neither of which was recorded on Exhibits 1 to 5 (Tr. 2202) and a call from Maloney to Crosby (Tr. 2200). This was the Government's case on divulgence and use.

In addition to the foregoing witnesses, the Government called Bernard Kane who testified he had rented the two apartments involved at different times at the request of the defendant Elkins, and James Jenkins, who was named in one of the overt acts and who refused to testify on the ground of the privilege against self-incrimination (Tr. 2009). The Government also called Mr. Swank, a special agent for the telephone company who identified the toll records, or long distance calls, for Maloney's apartment in No. 502 King Towers—CApitol 8-1707, formerly ATwater 1707, and that the service records indicated that the phone was a hand set with a 25 foot cord and that usually a new instrument is installed each time there is a new tenant or customer (Tr. 2081). That the original installation was a telephone with a volume control on the bell and that the telephone lines in question connect to interstate lines (Tr. 2034); and that there was no record

of any complaints by Mr. Maloney about his phone (Tr. 2038).

The other witnesses called by the Government were Robert Carter and Alice Erickson, and we believe it is upon the testimony of these two witnesses (and the tapes themselves) that the Government relies for proof of "interception."

Carter was the manager of the King Tower Apartments and identified the occupancy records for apartments 502 and 503 (Tr. 1943 to 1946); that the two apartments have similar but reversed floor plans with a common kitchen wall and that in 502 there is an open archway between the kitchen and the living room (Tr. 1946, 1947). That after the articles first appeared in the Portland Oregonian in early 1956 he made an examination of Apartments 502 and 503 by removing the kitchen cabinets and that he found a hole about the size of a lead pencil just below the ceiling in the common kitchen wall between apartments 502 and 503 (Tr. 1947-1948) and that in the back of the back (or kitchen side) of the "stub wall" between the living room and kitchen of apartment 502 and about six feet from the floor, there was a hole scooped out in the plaster about the size of a teacup on the kitchen side, and on the living room side there was nothing left but the wall paper without 18 pin holes through it (Tr. 1958 to 1950). That Mr. Maloney (in Apt. 502) had his own unlisted telephone and that there was no switchboard in the apartment or rooms and that there was only one telephone in Mr. Ma-

loney's apartment and that the phone wires went down on the outside wall of the building (Tr. 1961, 1973) from the fifth floor (Tr. 1983); that a key to the basement telephone box had been given to law enforcement agencies (1987 to 1988), to-wit, the Portland Police Department (Tr. 1995, 1996).

Alice Erickson was a public stenographer in an office building in Portland and was employed by the defendant Elkins on the day of the occurrence concerning which she testified. Under Oregon law her testimony would have been privileged but the Court overruled defendants' objection on this ground (Tr. 2016 to 2018, 2045—the Court's ruling at 2051-2052). She testified that on November 18, 1956 (Tr. 2016) the defendants Elkins and Clark, a Mr. Dodd, an attorney from Seattle representing Joseph McLaughlin, and Mr. Hannon (a Portland attorney who formerly represented the defendant Elkins), whose condition was "not alert" and which caused the witness some concern (Tr. 2100, 2139), discussed the preparation of some "affidavits." Her testimony was long, and in the record quite confusing but in essence was that a form of affidavit (unsigned) was brought to her by Mr. Dodd (Tr. 2118, 2121) and some changes dictated into this form. She had a record of these changes but after it was completed neither Elkins nor Clark would sign it until there were some further changes made when it was signed, and that she had no recollection or record of these latter changes (Tr. 2122, 2132, 2142). That the phrases "telephone rings or telephone recordings" were used (Ex. 61 and 62, Tr. 2136) but it was

her impression that Elkins and Clark were talking about the sound of a telephone ringing "over here" and a wall microphone "picking up the sound" (Tr. 2144, 2166). The court overruled counsel's motion to strike this testimony (Tr. 2169-2171).

The only other testimony in the nature of an admission was Deputy Minielly's testimony that Clark, during the State search, said: "I hear you found GD tapes of Langley's," and that shortly thereafter, Journal reporter Williams asked Clark, "Did you make these tapes for Elkins?" to which Clark replied, "Yes, I did and you know it and that's why you are here." (Tr. 581, 582).

SPECIFICATION OF ERROR NO. 4

The Court below erred in giving its instruction of the terms "intercept," "intercepted" and "interception."

SPECIFICATION OF ERROR NO. 5

The Court below erred in refusing to give defendant Elkins' requested instruction on interception, Nos. 9 and 10.

SPECIFICATION OF ERROR NO. 6

The Court below erred in refusing to give defendant Clark's requested instructions on interception, No. 9.

SPECIFICATION OF ERROR NO. 7

The Court below erred in failing to grant defendants' motion to acquit in so far as the same was based upon the insufficiency of the evidence produced by the Government showing the fact of the "interception."

SPECIFICATION OF ERROR NO. 8

The Court below erred in denying defendants' motion renewing of a motion for acquittal at the close of the Government's case, based upon the same grounds as Specification No. 4 above.

SPECIFICATION OF ERROR NO. 9

The Court erred in denying defendants' motion for judgment and acquittal made after verdict, based upon the same grounds.

SPECIFICATION OF ERROR NO. 10

The Court below erred in failing to grant defendants' motion for a new trial based upon the same contentions.

These points were raised by (a) the defendants' motion to acquit (Tr. 2459, 2468) and their renewal of the motion to acquit at the close of the Government's case (Tr. 2490, 2491), (b) by their exception (Tr. 2533, 2534, 2528) to the Court's instruction defining "interception" (Tr. 2502). The Court's instruction, the defendants' exceptions and requested instructions on

this subject are all set forth in full (infra pp. 100 to 108), (c) by the defendants' motion for a new trial (Rec. 32, p. 118, 119), and (d) by objection to the receipt into evidence of Exhibits 1 to 5 (Tr. 1903 at 1904 and 1908, the Court's ruling at 1933 and 1934-1935).

Preliminary Statement

We are aware of this Court's Rule 18, 2. (d) relating to setting forth instructions. All of the foregoing seven assignments of error revolve around what we believe to have been the Court's and the Government's erroneous interpretation of the term "interception" and of the evidentiary requirements to establish an interception in violation of Section 605. For this reason we will discuss what we believe to have been the common thread of error which ran through and permeated the trial both with respect to the evidentiary requirements and the proper instructions on the term "interception." The instruction given by the Court and the defendants' requested instructions are all quoted in their entirety, infra, at pages 100, 103. We have taken the liberty of employing this form of presentation because we believe that this juxtaposition will clearly point out our contentions and reveal what we believe to have been the erroneous view of the Court below and of the Government concerning these questions.

ARGUMENT ON (a), (c) AND (d)

We believe the Court below was led into error by the Government in its reliance on the case of *United States*

v. Hill, 149 F. Supp. 83. The result was that the Court below took the position that the tapes themselves were evidence of interception, (Tr. 193, 194); that the tapes "speak for themselves" (Tr. 1933), and that the necessary element of interception existed if the conversation was overheard while it was in progress (Tr. 2502). In these respects, we believe the Court below erred.

With respect to the Supreme Court decisions, a chronological review suggests the following:

In the first *Nardone* case (302 U.S. 379, 82 L. Ed. 314), 1937, an evidence case, the Court held that direct taps to telephone wires was conduct proscribed by Section 605 and that evidence secured thereby was not admissible.

In the case of *Weiss v. The United States,* 308 U.S. 321, 84 L. Ed. 298, an evidence case, the Court followed Nardone and again held that evidence obtained from a direct wiretap was inadmissible notwithstanding the guilty pleas and consent extended at the time of trial by certain of the defendants.

In the case of *Goldman v. The U. S.,* 316 U.S. 129, 86 L. Ed. 1322, an evidence case, it appeared from the facts that Federal agents had fastened a microphone or listening device to the wall of a room adjoining that of defendants and had made a transcription of conversations taking place in the defendants' room. Part of the conversation consisted of defendant Shulman's talking into a telephone receiver, and the Court held that the overhearing and divulgence of what Shulman said into a telephone receiver was not a violation

of Section 605 (316 U.S. at 133). There the Court defined the term "interception" and specifically held (at page 133) that

> "words spoken in a room in the presence of another into a telephone receiver do not constitute a communication by wire within the meaning of Section 605,"

and again specifically stated that the listening in the next room to the words of Shulman as he talked into the telephone receiver was

> "no more the interception of a wire communication, within the meaning of the Act, than would have been the overhearing of the conversation by one sitting in the same room."

Compare the instructions of the court below (Tr. 2503):

> "So in determining and applying the meaning of the word 'interception,' or to intercept a wire communication, you are instructed that you must determine whether or not any telephone conversation, as we ordinarily understand the telephone conversation, was listened to or to what extent while it was being made or during the progress of conversation, either through instrumentalities of electrical devices or through the human ear, it was heard by another party. Now, that is one meaning of the word to intercept. . . ."

In the case of *On Lee v. The U. S.*, 343 U.S. 747, the Court held that the use by a "stool pigeon" of a small radio transmitter and microphone concealed on his person and the receipt of the radio messages by a narcotics agent did not constitute a violation of Section 605.

In the case of *Schwartz v. Texas,* 344 U.S. 199, 97 L. Ed. 231, the Supreme Court held that the use of an induction coil placed alongside the telephone and permitting the recording of telephone messages was not per se inadmissible under the rules of evidence of the State of Texas so as to prevent its use by aTexas court in a Texas state prosecution.

In the next case before the Supreme Court, *Benanti v. U. S.,* 355 U.S. 96, 2 L. Ed. 2d 126, an evidence case, the Supreme Court reversed a conviction based on evidence secured by a wiretap made by State officers. The Government sought to justify its position by showing that the State officers had authority by virtue of an ex parte State court order obtained under the New York wiretap statute to make the tap in question and that therefore the evidence should have been admissible. The Supreme Court held that the Federal statute preempted the field and that therefore the State statute could not give authority for the prohibited conduct of wiretapping, and reversed the conviction.

In the case of *Rathbun v. The United States,* decided the same day, 355 U.S. 111, 2 L. Ed. 2d 137, the Supreme Court affirmed a federal court conviction for transmitting a threat in interstate communication, the evidence of which was based upon a police officer listening to a conversation between defendant and complaining witness by means of an extension telephone in the complaining witness' home. The Supreme Court noted the divergence of opinion among the circuits as to what constitutes an "unauthorized interception" within the

meaning of 605 and held that listening on an extension telephone did not constitute an interception within the meaning of Section 605. (We should note that although the Chief Justice did not place the lack of "interception" specifically on the ground of consent, it seems implicit that he was discussing a situation where one of the parties to the conversation had consented to the overhearing.)

The sum total of the Government's case on interception was that the Government's exhibits were found in Clark's possession, that they were recordings of actual telephone conversations, and that the parties to the telephone conversations did not consent to such being "intercepted" or recorded. That there was a hole in the wall about six feet above the ground above the place where the telephone frequently sat and a hole between the two apartments; and that, according to Mrs. Erickson, there was a discussion by defendants of tapes concerning "telephone rings or telephone recordings" which she understood were made by the sound of the telephone "over here" and a wall microphone picking up the sound.

We respectfully submit that there was insufficient evidence of "lines intercepting the telephone wires" of Maloney as set forth in paragraph numbered II, Count I of the indictment (Record No. 3, page 11) nor was there any other evidence of an interception as that term has been defined by the Supreme Court and that therefore the various motions directed to this point should have been granted.

(b) (Instructions)

This point was also raised by the exception to the Court's instruction on interception and the exception to the Court's failure to give the defendants' requested instructions on "interception."

The Court instructed the jury as follows (Tr. 2502-2504):

> "You will notice that the law read to you and the courts in the indictment use the word 'interception.' You are instructed that this word as used in the statute has a definite meaning. Members of the jury, our Supreme Court has defined the term 'intercepted' as a portion of the wiretapping statute referred to to mean the taking or seizure by way or before arrival at the destined place. Therefore, in order to constitute the interception of a communication by wire as the Government contends in the various counts of the indictment you must be satisfied beyond a reasonable doubt that the communication by wire was taken or seized by the way or before that communication by wire arrived at the destined place. In other words, the taking or seizure of a telephone conversation to constitute an interception under the statute and under the indictment must occur while the communication is being made upon the telephone system.
>
> "The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation. What is protected and is intended to be protected by the statute is the message itself during the course of transmission by the instrumentality or agency of transmission. So, members of the jury, this meaning and interpretation of the word interception must be considered by you in the light of ordinary common knowledge.
>
> "One use of an 'interception' would mean to

deprive a person from it; for example, the interception of a football pass made during the time of flight; in other words, preventing its ultimate receipt or arrival at a certain destination.

"It is not the contention of the Government in this case that any one of the conversations which it claimed were intercepted, that the receiver thereof did not receive the message. So, in determining and applying the meaning of the word interception, or to intercept a wire communication, you are instructed that you must determine whether or not any telephone conversation, as we ordinarily understand the telephone conversation, was listened to or to what extent while it was being made or during the progress of the conversation, either through instrumentalities of electrical devices or through the human ear, it was heard by another party. Now, that is one meaning of the word to intercept. So, in considering the evidence bear in mind that it is not claimed that any telephone message here was intercepted to the extent that it was not received, but it is claimed in ordinary parlance by the Government that the telephone conversations it claimed actually happened were listened to by other persons and, as alleged, the defendants, through a listening device." (Tr. Vol. XV, pp. 2502-2504).

To the giving of this instruction and the failure to give the defendants' requested instructions, defendants' counsel except as follows (Tr. 2531):

"MR. CRAWFORD: Then, we respectfully except to the giving of the Court's instruction upon the definition of interception. Up to a point we believe that the Court correctly stated the law. Then we believe the Court erred in that respect the same way that if it had taken the analogy offered by the—Mr. Evans in his argument for Mr. Elkins. And, for the further reason, that we believe such an analogy is not correct, is in direct conflict with United States vs. Goldman."

And at page 2533, the defendants Elkins took his exceptions,—Mr. Evans speaking:

> ". . . We except to the Court's employing the analogy of the football pass on the ground that, in the first place, that is improper, I think, for the Court to make an analogy from one of the arguments when that particular analogy happens to have been employed by one of the counsel. More important even than that, was the Court's—what we believe to have been the Court's error in its definition of the word 'interception.' I am not able to fix the precise point, but I am under the impression that the Court read for a while, then after reading from the printed material the Court discussed—and I can't recall the exact words but something to the effect of overhearing a telephone conversation or what was protected was the conversation itself. And, in any event, the Court has in mind, I think, what I am referring to. And we specifically state that at that point the Court deviated from its former instruction and actually was contrary to the law as laid down by Goldman vs. the U. S. which is the latest Supreme Court case on that subject.
>
> "There is no particular contention made at any time in this case of an interception meaning a deprivation from the defendant and the effect of the Court's instruction is, as we see it, to leave the matter wide open as to the overhearing of a conversation in a room which conversation was being put onto the telephone wires by the party who was making the conversation."

The defendant Elkins requested the following instructions on interception:

"No. 9

"You will notice, Ladies and Gentlemen, that the statute used the term 'intercept' and I will now instruct you as to the meaning of this term as it applies to this statute and to the indictment upon which this prosecution is based.

"The term 'intercept' indicates or means the taking or seizure by the way, that is the taking in between two points, and it necessarily must mean taking before the arrival at the destined place. It does not mean the obtaining of what is sent before or at the moment it leaves the possession of the proposed sender, nor does it mean the obtaining of what is to be sent after or at the moment it comes into the possession of the intended receiver. For example, if a person is sitting in a room and another person in that room picks up a telephone, dials a number, makes a connection with the person on the other end with which he wishes to talk and the person who is sitting in the room overhears the conversation or the words spoken by the person who initiated the telephone call, such would not be an interception of the telephone or wire communication within the meaning of this statute. Similarly, if a person places a microphone or other instrument or device in the room or in the wall of the room in such a manner that the sounds of the person's voice as he speaks into the telephone are picked up and may be heard by a listener in an adjoining room, by use of such microphone or even are recorded on a recording machine connected to the microphone, such would not be an interception of a wire communication within the meaning of the statute. Now the Goveernment has charged in the various counts of this indictment that the defendants Elkins and Clark intercepted certain wire communications as will be more fully described to you in the later portions of my instructions, and in order for you to find that defendants Elkins and Clark inter-

cepted such wire communications as alleged in any of the various counts of indictment, you must be satisfied beyond a reasonable doubt that the communications were taken ahold of, or seized, *after* the communication or sounds entered the telephone system and before the time that they left the telephone system at the other end of the wire. In other words, it must have been a wire communication that was intercepted. If there is a reasonable doubt in your minds that all or any of the conversations which have been played to you on the tape recordings here did result from an interception, as I have defined it to you, then you must return a verdict of not guilty as to these defendants as to all such counts on which you so find there exists a reasonable doubt as to such interception. Of course, before you could find the defendants guilty as to any of the counts you must not only find beyond a reasonable doubt that there was an interception as I have defined it to you, but also that the other material elements have been proved to your satisfaction beyond a reasonable doubt." (Transcript of Record, Volume I, pp. 190-192).

"No. 10

"Ladies and Gentlemen of the Jury, I have already read to you the provisions of Sec. 605, of Title 47, U.S.C., which is known generally as the 'wire tapping' statute, and which is, of course, the statute under which this indictment is brought. You will notice that both the statute and the indictment use the word 'interception' and I instruct you that this word, as used in this statute, and in this indictment, has a definite meaning, as a matter of law. I shall now define the term 'interception' to you and I instruct you that you must find, beyond a reasonable doubt, that an interception occurred, as well as the other material elements of each count of the indictment, before you would be authorized to return a verdict of guilty as to any such count of this indictment.

"That is, if the facts as you find them do not constitute an 'interception,' as I shall define it, then, no matter what your own view may be as to the facts in this case, you must return a verdict of not guilty as to Counts 2, 5, 6, 7, 8, and 9, regardless of what you may think of the conduct of the defendants with respect to the making of tape recordings.

"Now, Ladies and Gentlemen, our United States Supreme Court has defined the term 'intercept,' as a portion of the 'wiretapping' statute, to mean the *taking or seizure by the way or before arrival at the destined place,'* and therefore, in order to constitute the interception of a communication by wire, as the Government has charged in this indictment, you must be satisfied beyond a reasonable doubt that the communication by wire was taken or seized by the way or before that communication by wire arrived at the destined place. In other words, the taking or seizure of a telephone communication, to constitute an interception under the statute, and under the indictment, must occur after the communication enters or embarks upon the telephone system, and before it has left that system. This is so, because (as the Supreme Court has said, in the case of *Goldman v. U.S.*, 316 U.S. 129, 86 L. Ed. 1322) the protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation. What is protected, and is intended to be protected by the statute is *the message itself* throughout the course of its transmission by the instrumentality or agency of transmission. For example, although we are dealing in this case solely with a question of whether or not these defendants intercepted telephone communications, words written by a person and intended ultimately to be carried, as written, to a telegraph office, do not constitute a communication within the meaning of the Statute until they are handed to an agent of the telegraph company. Likewise, with respect to a telephone communica-

tion, words spoken in a room in the presence of another into a telephone receiver do not constitute a wire communication within the meaning of the statute. Therefore, the listening in the next room by one, to the words of a person in the adjoining room which are spoken into a telephone instrument, does not in and of itself, constitute an interception of a wire communication within the meaning of the statute." (Transcript of Record, Volume I, pp. 192-194).

Defendant Clark's requested instruction:

"No. 9

"Now, you will recall that I have, a short time ago, defined an interception as the taking or seizure by the way or before arrival at the destined place. By contrast, I instruct you that it is *not* an interception to obtain, either by listening, or recording on tape, words that are to be sent, before, or at the moment those words leave the lips of the sender. Nor is it an interception to obtain the words of the party on the other end of the line after, or at the moment they come into the ear of the intended receiver.

"Now, Ladies and Gentlemen of the Jury, I shall give you several examples of what are and what are not interceptions of telephone communications within the meaning of the statute. Of course, if a person attaches wires to the telephone wire connecting two parties together, and the person who attached the wires was thereby able to obtain the conversation passing over the telephone line, I instruct you that such would be an interception, within the meaning of the statute. On the other hand, if a person had a microphone in the wall near a telephone instrument, and this microphone was utilized so as to permit another person to overhear, or even record the words of the person who was using the telephone instrument, by virtue of the fact that what the microphone was picking up was the words

spoken by the telephoner before, or at the moment they were leaving the lips of the sender and before they entered the telephone system, such overhearing of the conversation would not be an interception of a telephone communication within the meaning of the statute and indictment we are concerned with here.

"I further instruct you that if this microphone in the wall was powerful enough not only to permit the overhearing, or even recordation of the words of the person speaking into the phone in the room in question, but also powerful enough to permit the overhearing, or even recordation of the words of the person on the other end of the line, by virtue of the fact that what was being overheard and recorded were the words of the person in the room *before* they entered the telephone system, and by virtue of the further fact that the words of the person on the other end of the line were being overheard and recorded *after* they had left the telephone system, such would not be an interception within the meaning of the statute.

"Now, in light of the definition of the term 'interception,' as I have just defined it to you, I further instruct you that the Government has charged in this case, with respect to Count I, the conspiracy count, that the interception occurred by virtue of a recording device being connected to lines intercepting the telephone wires of Thomas Maloney's phone in apartment 502 of the King Tower Apartments, and consequently, before you can return a verdict of guilty as to the defendants, or either of them, on Count I, you must be satisfied beyond a reasonable doubt that the defendants conspired to intercept telephone communications in that manner. Of course, you would have also to find beyond a reasonable doubt the other material elements of Count I, as I have or shall define them to you.

"With respect to Counts 2, 5, 6, 7, 8 and 9,

since each count charged the defendants, and each of them, with an interception of a wire communication, before you would be able to find an interception, you must be satisfied beyond a reasonable doubt, as to each Count, that the recordings did not result from the existence of a wall microphone which was powerful enough withother attachments not intercepting Maloney's telephone wires to permit the overhearing and recordation of the telephone conversations referred to in the indictment. You must be satisfied, beyond a reasonable doubt, that the overhearing and recordation, if any, of the telephone conversations claimed by the Government resulted from the intercepting of the wires of the telephone of Thomas E. Maloney, or from other interception of the message, during the time that the message or conversation was in the 'course of transmission' by and over the telephone system itself. Overhearing and recordation of the conversations which occurred at any time other than while the conversation was in the course of transmission would not be an interception. And I therefore instruct you that if you find that any overhearing and/or recordation, done or performed by these defendants, or either of them, occurred at any time other than during the course of transmission over the telephone system, then you must return a verdict of not guilty as to the defendants, and each of them, as to Counts 2, 5, 6, 7, 8, and 9." (Transcript of Record, Volume 1, pp. 177-180).

ARGUMENT ON (b) (Instructions)

It is our position that the Court's instruction completely lost sight of the distinction between eavesdropping and intercepting a wire communication.

We ask the Court to consider the Court's instruction on interception:

"So . . . you must determine whether or not any telephone conversation as we ordinarily understand

> the (term) telephone conversation, was *listened to* or to what extent while it was being made or during the progress of the conversation either (through) instrumentalities of electrical devices *or through the human ear,* it was heard by another party. Now that is one meaning of the word to intercept. . . ." (Emphasis and parenthetical added).

Then consider the admonition given by the Court immediately thereafter (Tr. bottom of page 503):

> . . . Bear in mind that it is not claimed that any telephone message here was intercepted to the extent that it was not received, but it is claimed in ordinary parlance by the Government that the telephone conversations it claimed actually happened were listened to by other persons and, as alleged, the defendants, through a recording device."

We submit that the Court below has confused the element of "consent" with that of "interception" (and in all fairness we must admit other courts have done the same). The statute makes it an offense (1) to intercept, (2) without the consent, etc., but we submit that the two are entirely separate. Interception must mean "taken by the way" as defined by the Supreme Court and we believe that discussions as to the relative speed of sound and electricity do not advance the cause of logic. We urge that the correct interpretation in view of the Supreme Court decisions, and indeed the only common sense definition of an interception, is that which interferes with the integrity of the telephone system and we invite the Government to point out any evidence in this case to indicate such an "interception."

The Court, in admitting the evidence, stated that the tapes "speak for themselves" (Tr. 1933). It is true that

the tapes reproduce voices, but they reproduce nothing as to the manner in which the recordings were secured. If the tapes "speak for themselves," it would seem to us to be mandatory to reverse this decision on this ground alone, for the reason that the tapes are equally consistent with the hypothesis that they were made under lawful circumstances through lawful means (assuming the *Goldman* case to still be the law). We trust the Court will take judicial notice of the laws of physics, that sound waves travel and can be picked up by either the human ear or a microphone.

To argue, as did the Government, one must start with the premise that these tapes found in Clark's possession contained recorded telephone conversations (and we assume for purposes of this argument that such was the fact). The participants to the conversations state they did not consent to its being intercepted or recorded. The Government introduced "admissions" allegedly made by Clark that he made the tapes for the defendant Elkins, and (from Mrs. Erickson, the public stenographer) to the effect that Clark made recordings for Elkins and that they were made with a wall microphone and picked up "telephone rings or recordings." Is this evidence of interception? There is no crime to *possess* recorded telephone conversations. The crime is unlawfully interecepting and divulging, or using them after acquiring knowledge that they were unlawfully intercepted. Perhaps we belabor the point but the charge found in paragraph 2 of Count 1 of the indictment was (Rec. No. 3, page 11): that this recording device would be connected to *lines intercepting the tele-*

phone wires of Thomas E. Maloney, etc." The Court permitted this case to go to the jury against each of these defendants without any evidence of interception except that gained by an inference upon an inference. If we infer from the lack of consent that the recording was unlawful and if we infer from the lack of knowledge and the hole between the two apartments that the recording took place in another room, then we could perhaps infer that it took place while the telephone was being used. We are at a loss to see how one can infer that there was an interception of a wire communication as distinguished from a mechanical eavesdropping on an oral conversation. We are aware of the fact that the Government will no doubt point out the change in volume of the background noise and the fact that sometimes the bells have a ringing sound and other times a buzzing sound, that in one or two of the conversations (relied on to support the two counts which were dismissed), one could hear an operator reporting on the call, etc. We still respectfully suggest that this does not aid the cause of "interception."

Let us apply a backwards test—if the evidence in this case is sufficient to support an indictment for a violation of § 605, would not any such indictment and conviction be sustained by proof that one had played a recording of a telephone conversation made without the consent of the parties, and regardless of how the defendant came into possession of the recording? If this is the law, we respectfully suggest that judicial construction has been substituted for one of the elements of the offense—namely interception.

SPECIFICATION OF ERROR NO. 11

The Court erred in using the football analogy in its instruction to the jury when the same had been employed by counsel for the Government in his closing argument in the jury.

The Court instructed the jury in dealing with the subject of interception (Tr. 2503):

> "One use of an 'interception' would mean to deprive a person from it; for example, the interception of a football pass made during the time of the flight; in other words, preventing its ultimate receipt or arrival at a certain destination."

In the Government's argument to the jury at the close of the case, Mr. Luckey argued in part as follows (Stipulation for Supplementing Transcript, attached to Volume XV of the Transcript of Proceedings):

> "But, with reference to interception, a homely example might well be the football player who throws a pass to the end and the end fumbles but it goes on beyond the end and someone, in the language of the announcer, intercepts that pass. I suggest to you that certainly in common understanding we are not obligated to prove more than that these telephone conversations were obtained by a third person unknown to the senders or the parties to the conversation. And, that was clearly done."

The Court's instruction was excepted to by counsel for defendants as follows (Tr. 2531):

> "MR. CRAWFORD: . . . Then we believe the Court erred when the Court referred to the analogy of the football pass as advanced by the State. We believe the Court erred in that respect the same way that if it had taken the analogy offered

by the—Mr. Evans in his argument for Mr. Elkins. And, for the further reason, that we believe such an analogy is not correct, is in direct conflict with United States vs. Goldman."

And at page 2533, the defendant Elkins excepted in the following manner:

"MR. EVANS: . . . We except to the Court's employing the analogy of the football pass on the ground that, in the first place, that is improper, I think, for the Court to make an analogy from one of the arguments when that particular analogy happens to have been employed by one of the counsel. More important even than that, was the Court's—what we believe to have been the Court's error in its definition of the word 'interception.' etc."

ARGUMENT

At the outset we wish to make it clear that we believe the Court's using the same analogy as that employed by Mr. Luckey was inadvertent in that the Court did not have in mind the fact that Mr. Luckey had employed it in his argument. We respectfully suggest, however, that notwithstanding the innocence of the Court in employing this analogy, the damage was done. We do not believe that it requires a "refined calculus" to determine the effect on the jury of hearing an argument made by one of counsel employing a "homely example" and then to have the same "homely example" repeated to them in the course of the Court's instructions. Further than that, we think the unintentional but inevitable effect of this was to point up what we conceive to be the gross error of the Government's position, that with reference to interception "we are

not obliged to prove more than that these telephone conversations were obtained by a third person unknown to the senders or the parties to the conversation"! (Compare this with the language of Mr. Justice Roberts in the majority opinion in the *Goldman case* (316 U.S. 129, supra, at page 97).

SPECIFICATION OF ERROR NO. 12

The Court below erred in compelling Government witnesses Minielly, Schrunk, Howlett, Lonergan, Cross, Gurdane, Darby and Langley to testify in violation of the terms of the State court restraining order.

This question was raised by objection, first, to the testimony of Mr. Minielly (Tr. 569-571). Similar objections by counsel and directions by the Court were given to each of the above named witnesses—Schrunk (Tr. 801, Howlett (Tr. 1090-1094), Lonergan (Tr. 1145-1149, 1152, 1155, 1157, 1158); Cross (Tr. 197); Darby (Tr. 1266); and Langley (Tr. 1389). In each of these cases the Court ordered the witness to testify under penalty of contempt under the theory that he supremacy clause of he United States Constitution (M.C. 50, Tr. 25) and lack of jurisdiction in the Circuit Court (Tr. 37) based on 73 U.S. 166, *Riggs v. Johnson County* (Tr. 37).

ARGUMENT

Appellants contend that the action of the trial court in compelling the witnesses above name to testify concerning the State search and seizure (and in admitting Government's Exhibits 1 to 5 and the sublettered exhibits) violated the appellants' rights under the fourth and fifth amendments of the United States Constitution.

Appellants contend that, regardless of the question of whether or not illegally seized state evidence is admissible in a federal prosecution (cf. *Hanna v. The U. S.,* U.S. Court of Appeals D.C. Circuit, decided October 2, 1958), the action of the court below, under the doctrines of *Wolf v. Colorado,* 338 U.S. 25, 93 L. Ed. 1782, and *U. S. v. Rea,* 350 U.S. 314, 100 L. Ed. 233, deprived defendants of their right of due process and subjected them to unreasonable search and seizure, since it denied to appellants their right of state "due process."

When the State Court, through the injunction suit, sought to redress the wrong perpetrated by the illegal State search warrant, we submit it was acting within its legitimate jurisdictional sphere. Did not the order of the court compelling these witnesses to testify, in effect, advise the State court that it had no right to follow the Weeks' doctrine? *Weeks v. The U. S.* (232 U.S. 383). If this is permissible, of what value is the Fourth Amendment protecting against unreasonable search and seizure by the Federal Government or the Fifth Amendment guaranteeing due process in the Federal courts? The defendants cannot complain under the Fourteenth Amendment because the State court not only agreed

with them but did its best to protect them from the consequences of an illegal State search and seizure. Its precedent in so doing was the Rea case, supra. We suggest that the case cited to the lower court by the Government (M.C. 51) and relied on by the District Court (Tr. 37), *Riggs v. Johnson County,* 73 U.S. 166 at 196, 18 L. Ed. 768, at 776, is, in fact, authority for the appellants' position. If the Federal Government cannot, by its Marshals, seize property held by the State Court subject to a State Court execution, can the Federal Court by threat of contempt compel State officers to testify in violation of a State Court restraining order simply because they have been served with a Federal subpoena? We respectfully submit that the State Court was not in any way trying to interfere with the Federal Court's conduct of the trial nor to restrain the Federal Court's prosecution of this offense. It simply said to its State officers, "You shall not be permitted to violate the policy of the State of Oregon by testifying as to what you learned on the night of the illegal search."

Justice Frankfurter, in the Wolf case, stated (338 U.S. at 28):

> "Accordingly, we have no hesitation in saying that were a state affirmatively to sanction such police incursion into privacy, it would run counter to the guarantee of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. . . ."

And again at page 31 (speaking of the states which did not follow the Weeks' doctrine but relied on other means of protecting the right of privacy):

> " . . . Granting that in practice the exclusion of

> evidence may be an effective way of deterring unreasonable searches, it is not for this court to condemn as falling below the *minimal* standards assured by the due process clause a state's reliance upon other methods which it consistently enforced, would be equally effective." (Emphasis added).

If the question before the Supreme Court was whether or not a State might adopt a substitute for the Weeks' doctrine without running afoul of the Fourteenth Amendment, can there be any question concerning a State's right to enforce the Weeks' doctrine? If so, did not the lower court in this case deprive the defendants of due process under the Fifth Amendment, and subject them to an unreasonable search and seizure under the Fourth Amendment, by failing to recognize the State's doctrine and accepting (or even picking?) the "fruit" of the illegal search?

The Federal Court here, by compelling the State officers to testify in violation of the restraining order, in effect, was "affirmatively to sanction such police incursion into privacy" as would "run counter to the guarantee" of the Fourth and Fifth Amendments. The Federal Court said, in effect, we will not allow you to implement your policy toward errant State officers, even though that policy is the same as is the Federal policy toward errant Federal officers. *Rea v. U. S.*, supra.

SPECIFICATION OF ERROR NO. 13

The Court erred in admitting Exhibits 1 to 5 and sub-lettered exhibits into evidence generally and in failing to give the identical instructions requested by each defendant (Defendant Clark's requested in struction No. 10—Transcript of Record, pp. 180-181, and Defendant Elkins' requested instruction No. 28—Transcript of Record, pp. 220-222).

ARGUMENT

(a) *Their receipt into evidence.* The Government had offered Exhibits 1 to 5 on a number of occasions, each time the defendants had objected that insufficient evidence to establish the chain of custody had been offered and finally (Tr. 1902) Mr. Luckey stated:

> ". . . I would like to, however, get the matter disposed of with reference to the reception of this evidence."

To which defendant objected (Tr. 1903):

> "MR. EVANS: Now, at this time, Your Honor, we would object to receipt into evidence of Government's Exhibits 1 to 5 which, I understand, are the reels of tapes, for the reason . . . first, that there has been insufficient identification; second, that there is insufficient evidence of the chain of custody; third, that even in and of themselves they do not constitute evidence of a corpus delicti; although I am frank to concede they might be one element if properly coupled up or identified with other testimony; fourth, that there has been no connection shown here between those exhibits and my client, the defendant James Butler Elkins or for that matter with either of them; fifth, the fact

> that it now appears—I say now. Perhaps I should say that we renew our objections to their receipt on the grounds that they are the fruits of an illegal search and seizure."

and the matter was then argued (Tr. 1904-1909) at which point the defendant Clark joined in the objections and argued (Tr. 1909-1923). The Government answered the argument, counsel replied, and at page 1932 the Court commenced its ruling dealing with the chain of custody at page 1935, and overruling the objections at page 1936.

We will not belabor this point here. We readily concede that it is discretionary with the trial court as to what amount of identification must be required before the tapes or any exhibit can be admitted before the jury in a criminal case. We suggest that the Court below erred in exercising such discretion in view of the peculiar circumstances of this case; the making of many copies, the possession of the tapes by parties referred to therein, and the complete lack of any normal semblance of routine police practices in marking and identifying exhibits, and the absence, as a witness, of the ubiquitous Mr. Williams, Journal reporter who had the initial conversation with Mr. Herder, who was present on the raid, and who asked the fortuitous question, "Did you make these tapes for Elkins?" He was not called as a witness although present at the beginning of the trial and at defendants' request excluded from the Court room (Tr. 161, 162).

(b) *The instructions.* Assuming, however, that the Court did not abuse its discretion in admitting the

tapes, was it not error to fail to give the following cautionary instructions requested by each defendant?

> "I instruct you, Ladies and Gentlemen of the jury, that there has been introduced into evidence herein certain reels and certain tapes known as Government's Exhibits 1 to 5 inclusive. It is upon the verity and proper identification of these reels and tapes that the Government's case rests.
>
> "Before their admission into evidence, the Government was not required to prove in order to admit the said exhibits that every possibility of mistaken identity be excluded but only that it was probable that the said reels and tapes were properly identified. However, once that the said reels and tapes had been admitted into evidence and the question arises as to their verity, genuineness and authenticity, it then becomes encumbent upon the Government to prove by competent, substantial evidence which convinces you beyond a reasonable doubt that the chain of custody, that is, all the various circumstances, places and persons who had anything to do with the custody of the said reels and tapes is completely unbroken or satisfactorily explained from the time that they were first obtained, if you find that they were obtained from the defendants, until the time that they were introduced as evidence herein. This is what is known as the chain of custody, and I instruct you that if you find that if one link in the chain is entirely missing, the chain of custody is not complete. Evidence other than the persons having custody of the said reels and tapes is not sufficient to supply missing links in the chain. This is especially true if there has been intermeddling by persons not called as witnesses in this case who had anything to do with the custody of the tapes and reels, or if the circumstances surrounding the preservation and custody of the reels and tapes were of a suspicious nature, so I instruct you that before you can find that Government's Exhibits 1 to 5 inclusive, constituting

> the said reelsa nd tapes, were actually in the possession of the defendant in the same condition as they were introduced in the Court herein, it is necessary that the chain of custody and each and every link thereof be entirely supplied and accounted for by the Government by evidence which convinces you beyond a reasonable doubt that they were, in fact, the identical tapes in the same condition which the Government claims were found in the home of the defendant Clark on May 17, 1956." (Rec. pp. 180, 220. Clark's Request No. 10, Elkins' Request No. 28).

The failure to so instruct was specifically excepted to by each defendant (Tr. 2528, 2533). The Court did give cautionary instructions with respect to "oral admissions" (Tr. 2517, 2518), "circumstantial evidence" (Tr. 2519 2520), "burden of proof" and presumption of innocence (Tr. 2520, 2495), but gave no instruction touching upon the subject matter referred to in the requested instructions. We believe the instruction correctly states the law and that on the cross-examination of the Government's witnesses beginning with the Mayor and Sheriff, Mr. Schrunk, his testimony concerning the making of the copies, the complete lack of any identification mark on the tape itself that a question arose as to the verity, genuineness and authenticity of the tapes, and we believe that the requested instruction should have been given. *U. S. v. Penick Co.,* 136 F.2d 413.

SPECIFICATION OF ERROR NO. 14

The Court below erred in failing to allow specification VI of defendants' motion to dismiss the indictment (Tr. of Rec. No. 11 at page 43 in Court's opinion thereon Tr. of Rec. No. 18, page 74 at page 79), and failing to allow defendants' motion in arrest of judgment.

On March 19, 1957, defendants moved to dismiss the indictment for the reason, among other grounds, that Counts II, V, VI, VII and IX failed to refer to or allege interstate commerce. The Court's written opinion is found at page 79 of the Transcript of Record.

After verdict, defendants moved in arrest of judgment (Record No. 33, pp. 121-126) and the various points raised thereunder have been discussed elsewhere in this brief except the following:

> "2. Each count of the indictment fails to state an offense over which this Court has jurisdiction in that each count fails to allege any interception of a communication by wire which was then and there being carried over or transmitted by a facility, instrumentality or apparatus which was part of a system of wire communication in interstate commerce."

We call the Court's attention to the fact that on defendants' cross-examination of Mr. Swank, it appeared that Thomas Maloney's telephone was connected to an interstate system (Tr. 2034). We also call the Court's attention to the fact that Counts 3 and 4, which were dismissed, referred to conversations between Oregon and Washington and also that Count 8,

upon which the defendants stand convicted, charges the defendants with intercepting a wire communication between "Thomas E. Maloney, in Portland, Oregon, and Joseph McLaughlin in Seattle, Washington" etc. (Tr. of Rec. No. 3 at page 20).

ARGUMENT

Other than noted above, the indictment is silent as to any charge or suggestion that the messages involved were in any way moving over interstate facilities or on intrastate facilities used also for interstate transmission of messages.

We believe this is a fatal error as to all counts. Although Count VIII alleged defendants "did unlawfully intercept . . . a wire communication between . . . Maloney, in Portland, Oregon and . . . McLaughlin in Seattle, Washington" and thus might inferentially charge interception of an interstate message, compare it with the language of one of the dismissed counts, Count III: "did intercept . . . a wire communication between . . . Maloney, *communicating from the State and District of Oregon, to . . . McLaughlin in Seattle, in the State of Washington, the same being an interstate communication by wire, . . .*" (Rec. No. 3, page 15). Neither Count III nor Count VIII can aid the rest of the indictment, as each count must stand alone, and each of the remainder are insufficient.

> ". . . Jurisdiction cannot be presumed in any court, even in preliminary stages, or has any federal court ever held to the contrary". (*U. S. v. Chiarito,* 69 F. Supp. 317).

By analogy from the Dyer Act cases, we note the requirements of *Cox v. The U. S.,* 96 F.2d 41 (8th Cir. 1938), *Davidson v. The U. S.,* 61 F.2d 250, and the earlier cases cited therein, reversing convictions under the Dyer Act when the evidence (and in the Davidson case the indictment) negatived any inference that the car was a part of interstate commerce at the time it was either received or was sold.

Congress has no jurisdiction over telephone messages unless they are either in or affect interstate commerce, or are being transmitted on a system which is a part of the instrumentalities used in interstate commerce. See *U. S. v. Polakoff,* 112 F.2d 888; *McGuire v. Amrein,* 101 F. Supp. 414, holding that the Federal Courts have jurisdiction of an offense under the wire-tapping statute as to intrastate telephone communications. In reaching this conclusion they rely on *Weiss v. The U. S.,* 308 U.S. 321, 84 L. Ed. 298, where the Supreme Court said:

> "We hold that the broad and inclusive language of the second clause of the section is not to be limited by construction so as to exclude intrastate communications from the protection against interception and divulgence."

We suggest that this statement should be read with the earlier statement of Justice Roberts (at p. 327):

> "And, as Congress has power, when necessary for the protection of interstate commerce, to regulate intrastate transactions, there is no constitutional requirement that the scope of the statute be limited so as to exclude intrastate communications."

The case of *U. S. v. Gris,* 146 F. Supp. 293, would appear to be contrary to the position being urged here. In that case there was no allegation in the indictment concerning the interstate character of the messages, etc. and the defendants contended that the indictment was insufficient. The District Court for the Southern District of New York held that the indictment was sufficient on the authority of *U. S. v. Varlack,* 225 F.2d 665, and on the *Weiss* case, supra. We believe that a reading of the *Gris* case as well as the *Varlack* case makes the holding in the *Gris* case somewhat doubtful for the reason that the trial court cites these authorities for the proposition that Section 605 is equally applicable to intrastate messages. In the *Weiss* case, supra, as we have pointed out, jurisdiction in extended to intrastate messages when necessary to control interstate communications or when necessary for the protection of interstate commerce to regulate intrastate transactions. The instant case, so far as we have been able to determine, is the first one in which the contention has been raised that the indictment should at least plead the constitutional requirements, i.e., that the conversation was either in or affected interstate commerce or being held over facilities which were a part of an interstate system.

In the *Varlack* case, 225 F.2d 665, the question was whether or not an indictment charging defendants with violation of the Hobbs Act (extortion affecting commerce) was sufficient when the indictment only referred to commerce and did not characterize it interstate or foreign. The Court of Appeals held that it was

sufficient, pointing out that the indictment referred to unloading of ocean vessels of raw sugar and further that there was a year between the time of indictment and the time of trial, which the Court of Appeals felt was ample time within which the defendant could have moved for a bill of particulars, etc.

We do not believe the Government seriously contends that it has jurisdiction over private intrastate communication systems, such as a private logging company telephone, an apartment house communication system, etc. Is the Court going to presume that the conversation was in or affected interstate commerce or communications simply because it was alleged that they were "telephone" conversations? If so, would a Dyer Act indictment be sufficient if it simply alleged that the defendant drove the car "along the highway"? We call the attention of the Court to the illustrative forms appended to the Federal Rules of Criminal Procedure, particularly Form 7 and Form 11, each of which contains the allegation of "interstate commerce." The reason seems obvious—there would beno jurisdiction of the crime of receiving the stolen vehicle, under Form 7, or delivering the consignment of adulterated food, in Form 11, unless *interstate commerce* was involved or affected.

We believe that on this ground alone this case should be reversed and remanded under Rule 34, F.R.Cr.P. "if the indictment . . . does not charge an offense or if the Court was without jurisdiction of the offense charged." This Court only has jurisdiction if interstate commerce was involved or interstate communications affected. Such does not appear from the indictment.

SPECIFICATION OF ERROR NO. 15

The Court erred in submitting only one form of verdict and in failing to submit at least the general not guilty verdicts submitted by the defendants.

(The verdict form tendered by the Government and submitted by the Court is found on pages 107 and 108 of the Transcript of Record—No. 29.) Omitting caption, it read as follows:

> "We, the jury duly impaneled and sworn to try the above-entitled cause, do find the defendant, James Butler Elkins ..... guilty, and the defendant Raymond Frederick Clark ..... guilty of the crime charged in Count I of the Indictment.
>
> "We, the Jury, etc." (with identical language and identical paragraphs for Count II, Count V, Count VI, Count VII, Count VIII and Count IX of the indictment) . . .
>
> "Dated at Portland, Oregon, this ..... day of May, 1957.
>
> .....
> Foreman"

The defendants tendered a general form of not guilty verdict as to both, as follows:

> "We, the Jury, duly empaneled and sworn to try the above-entitled cause, do hereby return our verdict and find the defendants, James Butler Elkins and Raymond Frederick Clark, not guilty.
>
> "Dated this ..... day of May, 1957.
>
> .....
> Foreman"

(Tr. of Rec. 223).

Similar forms of not guilty verdicts for each defendant were submitted (Rec. 224, 225) as well as the

various combination verdicts possible (Rec. 225-228). At the conclusion of the instructions, the Court instructed:

> "There will be submitted to you one form of the verdict and this has been drawn in this manner so that it would simplify the matter for you. It reads as follows (Tr. 2524). 'We, the Jury duly impaneled and sworn to try the above-entitled cause, do find the defendant, James Butler Elkins' —there is a blank space—'guilty, and the defendant Raymond Frederick Clark'—and a blank space —'guilty of the crime charged in Count 1 of the indictment.' And then follows identical language on connection with each of the seven counts remaining in the indictment . . ." (Tr. 2525).

The Court then explained as to inserting the word "not" if their verdict was not guilty as to each defendant as to each count or leaving it in its present form if their verdict was that the defendant was guilty on such count. To this procedure counsel excepted (Tr. 2532):

> ". . . but I specifically except to the failure of the Court to submit at least the general not-guilty verdict forms submitted by counsel and, also, I think, the not-guilty form as to each defendant individually. I think that it is error to submit only the one form of verdict which requires the writing of the word 'not' fourteen times before the defendants can return—or before the jury can return the verdict of not guilty."

ARGUMENT

We respectfully suggest that no criminal case should be submitted to any jury in the posture that it is more difficult to find a defendant not guilty than to find him guilty. In making this argument we are well aware of

the comparative triviality of writing the word "not" fourteen times. On the other hand, we are also aware of the practical importance of having the jury feel that it has a real choice between two forms of verdict. If the presumption of innocence has vitality, does it not require the submission of a "not guilty" form of verdict as well as the form submitted by the Government?

CONCLUSION

In light of the foregoing, it is urged that this case either be dismissed or, depending on the error found by this court, be remanded for a new trial with appropriate instructions to the court below.

Respectfully submitted,

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Attorneys for Defendants-Appellants.

APPENDIX

In the hope that it would be of assistance to the court we have attempted to summarize or digest the testimony of the witnesses called on the Motion to Suppress and in the trial on the merits, and list them here in order, with transcript references. Compilation of this necessarily involved some editing and it is not contended that this is complete but is only offered in the hope that it will assist the government and the court in locating various passages of testimony in the voluminous record.

On the Motion to Suppress

(Page references in this portion of the Appendix refer to the two volumes of testimony entitled *"Defendants' Motion to Dismiss and Defendants' Motion to Suppress Evidence"*.)

WILLIAM M. LANGLEY: He was District Attorney of Multnomah County, executed the affidavit in support of the state search warrant (41 to 43); that he received some "confidential" information and then information from Brad Williams, a Journal reporter (45); that the entire affidavit was executed on information and belief (47); that he obtained this information by listening in on an extension telephone while Brad Williams and the Chief of Police of St. Helens, Oregon (a Mr. Herder), had a conversation (49); that the telephone conversation took place with Mr. Williams and Mr. Langley in Mr. Langley's private office in Multno-

mah County Court House (50); that the tapes were played in his private office (60) and that that was before Elkins and Clark were indicted by the State Grand Jury (61); that he only heard them once (60) and that one of the tapes came off the reel while it was being played (61); that the State Court indictments were returned on the basis of "this evidence" (67) and that there was no cooperation between his office and any Federal agency in connection with the search and seizure (67).

ELLSWORTH HERDER was formerly Chief of Police at St. Helens, Oregon (71); that he never talked to Mr. Langley, that one evening in May, 1956 (73), a party called him on the phone and identified himself as Brad Williams, a reporter for the Oregon Journal (74); that he gave Mr. Williams some hearsay evidence telling him it was hearsay (75) and that he was positive this was in the evening (76) and his best recollection was that this was a Friday prior to the raid, i.e., May 11, 1956 (77); that he did not know the address of Mr. Clark and that after this telephone call ended and within three to five minutes of the end of it, the witness placed a person-to-person collect call to the Oregon Journal Building for Brad Williams, and he was connected to him promptly (78) and he recognized the voice as the same person he had talked to, that he had no personal knowledge of any obscene or indecent photographs or accompanying sound recordings (80); that he had discussed these pictures and recordings only on one occasion on one telephone conversation with Mr. Williams (81); that he never conveyed any such information nor

had any conversation with Federal officers concerning this transcript (83). At (84) the Government conceded that for purposes of the Motion to Suppress the State Search Warrant could be treated as illegal.

TERRY D. SCHRUNK at the time of testifying, Mayor of the City of Portland, and at the time of the raid, Sheriff of Multnomah County (86); that he went to the Clark home the evening of the raid after it had commenced (90) that he first heard of the raid about six o'clock after receiving a note that the District Attorney would like to see him; that he received the search warrant about six o'clock from the District Attorney and that Mr. Williams, the Journal reporter, was with him (91). That the witness had appeared on a live television program that night (the night before the primary election, when the witness was running for Mayor) and that after the television program he received a call and went to the scene of the raid (93 and 94); that there were tape recordings, wire recordings and slot machines seized at the time (97); that he does not know when he first saw the tape recordings, whether at the scene of the raid or at his office, but that they remained at his office the night of the 17th and the early morning of the 18th, but they did not remain in the safe (99); that the witness took his wife home after visiting the scene of the raid (99) and returned to his office about 1:00 A.M. Election Day (100); that they were played in the early morning hours of May 18 (103, 104); no Federal officers were present (104) but that Mr. Moore and Mr. Novak, a radio technician and a disc jockey, Mr. Brad Wil-

liams, the Journal reporter, and the Sheriff, were present (104); also another reporter may have been present, Doug Baker (105) and that Deputy Sheriff Minielly was present during a portion of the time (106); that he contacted the F.B.I. either on the Saturday or the Monday following the raid (108); that he had previously testified that "upon seizure (of the tapes) I called the F.B.I.," but that by upon seizure he meant that he was in the State court during a portion of the proceedings of a Motion to Suppress the Evidence but was not sure which day (114) that he was subpoenaed and he did not know whether it was a subpoena duces tecum as he did not know what a subpoena duces tecum was (115).

That copies were made of the tapes (116) "to protect the evidence" (117). When the witness was asked if the court (Judge Mears) ordered the tapes to be held by the witness, an attorney for the witness appeared and offered suggestions to the Court (117 to 119); that he called the F.B.I. because it appeared to him there was a possibility of "wire tap equipment being involved" (123) and that there was generally cooperation and exchange of information between the F.B.I. and the Sheriff's office (124); that it was the Sheriff's practice when they found evidence of a Federal statute or if they had knowledge of, or information to it, copies of their reports were sent or direct notification given to the various agencies involved. That this was good police work (126) that there were no Federal officers along on the raid on the Clark home (130) as far as the witness knew, no one from his

office contacted the F.B.I. until after the raid was completed (131).

HOLGER CHRISTOFFERSON—That he was a retired deputy sheriff, 70 years of age (132) and was Chief of the Criminal Department of the Multnomah County Sheriff's office for forty years, or 38 years (132); that during that time it was always the practice of the Sheriff's office to call in the appropriate law enforcement agency of the Federal Government if, in the investigation of State crimes, evidence of a violation of a Federal statute was also uncovered (134, 134) and that there was always good cooperation between the Sheriff's office and the various Federal enforcement agencies.

ROBERT W. FRANZ—was vice-president, director and cashier of the First Bank of Milwaukie (Oregon (137) and brought with him the records of the bank relating to certain safe deposit boxes (138) (exhibits, 11 and 11A); that safe deposit vault or box 912 was rented by the State of Oregon on June 4, 1956 (at no charge) (139); that it was rented to the Oregon State Police with Officers Cross and Gurdane being the authorized signers (141); that he had the list of authorized entries between June 4th and August 1st, 1956, and read them into the record (142); that there were three keys, two customer keys issued to Mr. Cross (145) and a guard key held by the bank (147) and that they were the usual safe deposit boxes (145 to 147); that on September 5, 1956, at 3:00 p.m. the records indicated that Officer Gurdane opened the box in question, that he was present on the latter date, and

Officer Gurdane and Ronald Sherk (an F.B.I. agent) were present (150); that he took a receipt for the property removed from the box (151) (Exhibit G-2) and the defendants agreed that a photostat of the enry record could be introduced (156).

The Motion to Suppress Exhibits were numbered (158). Langley Affidavit No. 3, Terry Schrunk Receipt No. 4 (signed by Minielly), the State Search Warrant No. 5, the Order declaring the Search Warrant a Nullity and Impounding Suppressed Evidence No. 6, the Transcript of Testimony at the State Motion to Suppress No. 7, the Affidavit in Support of Seach Warrant No. 8; the Reply to Motion of Defendants for Dismissal of Indictment, Defendants' Exhibit 9. Counsel offered the exhibits and requested permission to read them into the record. The court ruled that they should be submitted to the court, that there was no necessity to burden the record (162).

FRANK J. KENNEY—was special agent in charge of the U.S. Secret Service (164); that in most instances there was common practice and understanding between his department and the state and county officials of the State of Oregon, that if the state and county or city officials should discover evidence of Federal crimes within the Secret Service jurisdiction, they would turn the evidence of that crime over to the Secret Service and make it available to them (165); that it happened in the majority of cases and that the Secret Service cooperated with the state officers in matter of mutual interest (166); that this practice was engaged in during

1956 and that the word "understanding" did not refer to a written agreement but a tacit, oral "taken for granted" understanding (166) that the Secret Service operated independently in its own sphere and that he knew nothing of the facts in the instant case (167); that the decision of what cases to prosecute was made by the United States Attorney's office.

RONALD E. SHERK was a Special Agent of the F.B.I. and had been for 16 years, and in Portland for 2½ years immediately preceding his testimony (168); that he was also a member of the Oregon State Bar (169); that he signed the original of the affidavit for the Federal search warrant, Defedants' Exhibit 8-I (169) in the early afternoon of September 5th, and secured the Federal search warrant, Defendants' Exhibit 8-I (169) the warrant at 3:15 p.m. by making a search of the safe deposit box at the Milwaukie First State Bank (171); seizing the minifon wire recorder and five rolls of tape recording and three rolls of recording wire for the minifon (171); that he first heard the tape recordings in the Multnomah County Sheriff's office on the 8th floor of the Multnomah County Court House, in the company of another F.B.I. agent (171 to 172) and Deputy Sheriff Minielly (174); that this occurred in the early afternoon of Tuesday, May 22, 1956, and that he heard only part of one tape; that it was between 2 and 2:30 p.m. (196) and that the session was cut short when Minielly told Mr. Sherk that the Grand Jury wanted the tapes (195); that the witness recalls a discussion in the F.B.I. office Monday concerning newspaper articles and speculation as to whether or not

the tapes contained evidence of a Federal violation and that his superior, Mr. Santioana, the agent in charge of the office, directed him to go to the Sheriff's office to hear the tapes. Counsel inquired as to written reports (180). The Government objected. The Court permitted the witness to testify that there was a written report made, that he had been served with a subpoena duces tecum. The Government again objected and called attention to the fact that it had filed a Motion to Quash the subpoena (182 to 183); that the witness made notes of what he heard on the tapes on May 22, 1956, and they were made in his official capacity as a special agent of the F.B.I. and that they were in the file of the F.B.I. (185, 186); that the witness thought he recognized the identity of one of the voices in one of the conversations he heard on May 22nd as that of the District Attorney, Mr. Langley (188 to 190); that he saw five tapes, but he could not swear under oath as to the color of the boxes (193); that he played only one tape or a portion of one (194); that he did not recall how they happened to select the one particular reel that was partially played. The Court sustained an objection to the question as to whether or not Mr. Sherk knew that the Motion to Suppress was pending in the state court at the time he heard the evidence. The matter was discussed and counsel presented his theory to the court (196 to 208) and the court sustained the Government's objection after argument (208).

Mr. Crawford explained defendants' theories of the Motion to Suppress (210 to 212); that the witness Sherk did not hear the tapes again or any portion

of them until a few days after September 5th (215) and that from the time he heard a portion of one tape on May 22, 1956, until after the Federal search warrant had been executed on September 5, 1956, he had not heard any of the tapes (216); that there were notes in the box accompanying the reel of tape recording which he heard, that there were notes apparently relating to the identity of the persons whose conversations were allegedly on the tapes and that these names were on his notes to his superior (219); that the witness felt that because the alleged telephone conversations were recorded they were therefore intercepted (226).

When the witness Sherk was asked what facts he had in his possession and what was the extent of his personal knowledge on which he based that portion of his affidavit that the "intercepted telephone conversations were designed or intended for the use or benefit of a person or persons other than the senders" etc. (229) the witness asked the court to take judicial knowledge of the statements in the public press. He then stated that it was based on the publicity and the public press concerning tape recording generally, and that the tapes were obtained by the Sheriff's office from a source other than one of the participants to the conversations (230) and that the witness had been in error when he stated there were four rolls of recording wire (232).

That although he had only heard part of one tape he asked for five tapes in the affidavit for the search warrant because he knew there were five tapes there (233); that he couldn't be sure which one had the intercepted telephone conversation and that the notes on

all of the boxes were similar and he had been informed by the Sheriff's office that they contained intercepted telephone conversations (234).

That the witness did not have access to the safe deposit box but did enter the box and inspect the contents on August 13, 1956; that the first time he talked to witnesses Maloney and McLaughlin (241) that he had never talked to Gamruth (242) and that he had talked to Mr. Sheridan several times but with reference to these tapes only at the time of the "Grand Jury" in the early part of 1957; that he talked to Mr. Langley concerning this matter about May 29, 1956 (243); that when he entered the box on August 13, it was in the presence of Officers Gurdane and Cross of the Oregon State Police (174); that on that occasion he did not play the tapes (279) but simply looked at them (280) but he could not recall the color of the boxes and he did not know of his own knowledge that they were the same tapes although he believed they were (281); that neither the tapes nor the reels had been marked by Mr. Sherk (282).

Argument over whether or not Crawford claimed ownership of the tapes (286) et seq.

That is is impossible to tell what is on a tape from merely looking at the outside (290); that the box was opened by a key of the State Police Officer, Mr. Gurdane, and Mr. Franz, the bank manager (297); that he did not know of his own knowledge, at the time he opened the box, that the articles he found were in there prior to its being opened (297) and that he did not know of his own

knowledge that they were in the box at the time he executed the affidavit before the U. S. Commissioner (298).

Volume II—Defendants' Motion to Suppress

RONALD SHERK (continued)—That one of the reels seized on the Federal search warrant was the one to which the witness had listened on May 22, 1956 (305). That the witness had not talked to any of the other individuals whose conversation was reportedly recorded on the tape and therefore did not know whether any of them had consented to the alleged interception prior to September 5, 1956 except Mr. Langley (307). That in the witness' opinion parts of the recorded conversations were "recorded directly off the wire" (310) but that he, at the time of executing the Federal search warrant affidavit, had no information of his own knowledge as to the contents of the other four tapes (311). That in Sherk's opinion some of the conversations were recorded by means of a microphone concealed in the telephone instrument (313).

At this point (315) the Government took the position that further inquiry was immaterial unless the defendants would acknowledge ownership of the tapes or at least one of them and further (316) that it was immaterial whether or not the federal seizure was pursuant to a valid search warrant because the documents had been handed to the Federal authorities on a "silver platter." Defendants contended that it was not necessary for them to admit ownership in order to move

to suppress since they had been indicted based on the evidence in question (318-319) and that it was suffient to show that they were taken from the home of one of the defendants. Counsel for the defendants refused to admit that the legality of the Federal search warrant was immaterial (321) and the Court ruled (321-322) that it was immaterial as to whether or not the F.B.I. had a valid search warrant at the time they took possession and ruled that the defendants were precluded from inquiring further as to the basis of Mr. Sherk's knowledge or lack of knowledge when he executed the affidavit for the search warrant (323).

Sherk testified that he had in most instances turned over to State authorities evidence of State violations when the same was uncovered in connection with his investigations (326).

Defendants' counsel then requested the reports referred to in the subpoenas dues tecum (328) and the matter was argued, the Court marked a copy of the subpoena duces tecum (332) and ruled that the witness' testimony was primary evidence (332) and that any reports would not be competent as primary evidence and could only be admissible for impeachment and again (336) counsel asked the witness to produce any reports that he had made to his superior or to the United States Attorney during the periods of time mentioned in the subpoenas duces tecum, and the Court denied such request. Sherk stated that although there was cooperation between the State and Federal agencies, they operated independently (336-337); that there was no understanding with reference to this partic-

ular raid and that it was the decision of the United States Attorney as to whether or not Federal prosecution should be undertaken.

OSCAR HOWLETT was a deputy District Attorney on the staff of Mr. Langley and represented the District Attorney's office in the motion to suppress before Judge Mears. Mr. Howlett stated that he read to the State court judge in the State court motion to suppress hearing, a letter written by Mr. Langley to the Attorney General of the State of Oregon (343) which stated in part,

> "Wire tapping, as you know, is both a state and federal violation of law,"

That he could not say whether or not the State District Attorney was contemplating turning over to the Federal Government the seized material on the 18th and that he read the letter because he was given it by Mr. Langley before he went down to the hearing on the 21st or 22nd of May (344). That in his mind he intended proceeding with a State prosecution (346) and that defendants' Exhibit 12 was a copy of the answer to the motion to suppress filed by the District Attorney in the State court proceedings, and admitted that at the time of the State court hearing one of grounds urged in opposition to the motion to suppress was that the State district court had no power to suppress because the seized evidence constituted violations of Section 605 of the Federal Communication Act (349, 351 and 353). That he did not tell the district court that copies were being made of the tapes (354) nor that one of the reasons the tapes could not be produced into Court

was because the FBI agent, Mr. Sherk, was listening to the tapes (355), and that the tapes were not produced until the 23rd, the last day of the hearing (356).

HOWARD LONERGAN was a deputy District Attorney and an ex-F.B.I. agent (363) and was chief criminal deputy in the District Attorney's office (363); that defendants' Exhibit 13 was signed by him. Mr. witness Lonergan appeared before a State Court Circuit Judge, Judge Lonergan (no relation) and at that time urged that the State indictment for wire tapping be dismissed for the reason that a Federal prosecution of these defendants would be facilitated (367). This was done on September 11, 1956, or six days after the execution of the federal search warrant and prior to indictment by the Federal Grand Jury and the Court sustained an objection to the question of whether or not on January 10, 1957, the witness appeared with Clyde Crosby with a criminal complaint signed by Crosby before the United States Commissioner (question on page 368 and the Court's ruling on pages 370 and 371); that he felt the State Attorney General had wrongfully conceded that the State search was illegal (372) and that therefore if a prosecution was to be successful it would have to be by the Federal Government (372). The witness discussed his theory of State law applicable to search and seizure (372 to 376) and stated that before the seizure he had no understanding nor any contemplation that any evidence seized would be turned over to Federal authorities.

RICHARD NOVAK—that he was a "disc jockey"

(378) working for the Oregon Journal radio station and went to the Court House in Multnomah County election night, May 19th, on orders from the manager of the radio station; that he went to Sheriff Schrunk's office on the main floor, set up his equipment consisting of two recorders (380) and thinks he saw six tapes (381) and that he was there from 2:30 in the morning until 6:30 or 7:00. That he heard some abbreviated names and nicknames (382-383); that he gaves the copies of the two tapes to Brad Williams, the Journal reporter (385), that Mr. Williams was present during the entire time that Novak was there (385); that parts of the recordings he listened to had only background noises and room noises or conversations so subdued it was unintelligible (387) and that he did not make complete copies, but only copied what he was directed to by Mr. Brad Williams.

VAYNE GURDANE—That he was a State Police Officer and signed the bank safe deposit records as a person authorized to have access to the safe deposit box in question; that at no time did he take the tapes out of the box and that the first time he personally had any inquiry from Federal officials about the tapes was the last of July (1956) (393-394), and that was from Mr. Luckey, the United States Attorney (394). That he was holding them for the Attorney General of the State of Oregon who had been assigned the investigation of vice conditions by directive of the Governor of the State of Oregon (394-395).

GEORGE MINIELLY had been a Deputy Sheriff in Multnomah County for twenty-seven years and was

so acting in 1956 (397) and that on the 17th he was called by the Sheriff and asked to execute the search warrant on the premises of the defendant Clark (397) and it was necessary for him to use force to enter the front door (398); that there were only two women present when he entered—one being the defendant Clark's wife and the other a woman identified as Sonny Martin. That there were at least three uniformed officers along (398-399) and two Journal reporters (400) and a Journal photographer, Mr. Lee (400); that he did not know how the reporters happened to be present (401); that the defendant Clark arrived about 15 or 20 minutes after the officers gained access (401); that he looked for but he did not find any obscene photographs; that he looked for about 2 hours (404) but he did find some tapes and sound recordings in a hassock (404); that the hassock was between the two women; that he lifted the lid off the hassock but that he did not recall either of the reporters saying that was a hassock (405-406), and that he found five cardboard boxes stacked one on the other in the bottom of this hassock; that there were only five rolls of tape and that it was true that when Mr. Sherk was looking at the five reels of tape in the Sheriff's office Mr. Buell was untwisting a roll of tape in the District Attorney's office but that the reason for the confusion was that one of the boxes in Mr. Sherk's presence was an empty box (408); there were small notes or note paper with synopses on them with the boxes (410); that he does not believe there was anything about telephone or telephones on them (410);

that he found "thousands of phonograph records" (412) but only took two albums which defendant Clark identified as "party records"; that one of the newspaper men did ask him "did you look in the hassock" (413),in the State Court proceedings, answered the question as to how he happened to look in the hassock by giving the answer "That's my business" but that he was annoyed and it was an unfortunate remark (413-414). That he took the tapes out of the hassock, took them to the basement with him, set them on a bench where he could be alone and not be bothered by persons to examine the contents of the boxes (415) and after about five minutes returned upstairs and then locked them in his car out in front. That everyone present seemed to want to get their hands on them (415). That he had previously testified he had never played the tapes, which was correct. He had heard them played but hadn't played them himself (418). That he went home and went to bed and was called by the Sheriff and told to bring down a list that he had in his possession which he had found in the Clark residence (419), the list being a list of all the Deputy Sheriffs, their residences and their shift and what precinct they worked; that he signed Exhibit No. 2 (426); that it was made out by one of the other Deputy Sheriffs but that he was confused that night and there were errors made in the receipts (426); that he initialed the boxes in the Clark residence shortly after he seized them while he was down in the basement (427); that he seized a payroll book which had no obscene pictures or sound recordings, a 8 millimeter movie projector and three reels of children's film (429-430);

that he delivered the tapes to Sheriff Schrunk and was also present when Sheriff Schrunk handed them over to the State Attorney General, and that Mr. Clyde Crosby was also present at that time (430). (We think this may have been an error in transcription and that the man in question may have been Claude Cross, the State Police officer). That Mr. Minielly neither conferred with nor had any understanding with any Federal officials prior to staging the raid (431-432); that there was a common practice and understanding on the part of the Sheriff's office relative to reporting evidence of Federal crimes to the appropriate Federal bureau (433) and that he always did it (433) but that he operated independently of the Federal officers (434).

(Exhibits 14 and 15 were identified being the photostatic copies of the Governor's directives.)

CLAUDE CROSS was a lieutenant in the State Police (435) and was working under the Attorney General of the State in connection with the vice probe directed by the Governor; that he was present when Sheriff Schrunk and Mr. Minielly turned over to Mr. Thornton the five tapes in question, the Minifon, and the three reels of Minifon wire and that he kept them in his possession until June 4, 1956 (439-440), at which time he put them in the safe deposit box; that it is common practice of the State Police to turn over evidence of Federal violations to the appropriate Federal agency through channels (444).

VAYNE GURDANE recalled—That he turned over the five spools of tape to Mr. Sherk by virtue of the

search warrant (447) and that Lieutenant Cross was absent at the time (447).

JOSEPH SANTOIANA, Jr., the special agent in charge of the F.B.I. for the Portland, Oregon, District; that prior to May 17, 1956, he received no complaints from anyone with reference to any wire tapping activities and that he was on duty during May, 1956, but in and out of Portland (451). That he did keep records of complaints (453) and that the F.B.I. was the agency charged with the primary duty of investigating wire tapping (454). The witness refused to answer the question as to whether or not there was a complaint in his files complaining of wire tapping activities on the part of these defendants prior to May 17, 1956, by reason of the Departmental Executive order, and after discussion the Court instructed the witness he need not answer (456). The Court stated that its reason was that he felt it was immaterial. The witness volunteered that in answering the question he did not want to infer either that they were or were not conducting any investigation concerning the matter but was simply following what he believed Departmental instructions, to-wit, Departmental Order 3229. He further stated that (458) prior to and on May 17, neither he nor his office had any knowledge that the raid was going to be "pulled off" (458) and that his first notice of the raid was the daily press (459) and that he sent Mr. Sherk to Mr. Schrunk's office at the request of Sheriff Schrunk (460). The witness at page 465 volunteered the statement that the F.B.I. had no such agreement or knowledge nor made any agreements with any law enforcement agents as

to prosecution or turning over of any evidence in any case where it had concurrent jurisdiction or where the jurisdiction was solely that of the F.B.I. and Mr. Luckey then asked him the question calling for the above answer (465).

The balance of the record in Volume II relates to the discussion between the court and counsel of the motion to suppress, the argument thereon, and the Court's ruling denying the motion to suppress (519 to 531). This was delivered approximately 5:15 p.m., April 12, 1957.

On the Merits

(Page references following refer to the *"Transcript of Proceedings,"* Volumes I to XV.)

After the jury was selected, the Court then arranged for the copying of the tapes by a technician employed by defendants in open court, the copying to be done at the same time the recordings were being played for the court and counsel, and it was decided to hear them en camera on the first occasion. Also, the court introduced an editorial into the record as the Court's exhibit, which counsel stated they had nothing to do with. The technician was sworn by the Court (99) and the witness Sherk was called out of the presence of the jury to identify the tapes. There was no cross-examination on the preliminary identification (104-105) and the parties proceeded to a discovery proceeding consisting of listening to the contents of the tapes (Government's Exhibits 1 ot 5, inclusive) and to have copies made of

them by a technician under direction of the Court. The listening and copying was commenced the afternoon of April 18th (109-111), recessed at 6:30 p.m., convened at 7:30 p.m. the 18th, and ran until 11:45 p.m. April 18th, recessed until 10:30 a.m. the 19th. The morning of the 19th the Court was advised that the State court hed granted a temporary injunction restraining the State officers from testifying regarding the search and seizure and continued until noon April 19th, recessed until 1:30 p.m., concluded at 5:15 p.m., April 19th, and counsel for the Government made its opening statement with defendants counsel reserving their opening statement until the close of the prosecution's case (160) and the first witness was then called, who was

RONALD E. SHERK, an F.B.I. agent who was assigned to investigate wire tapping allegedly involving the defendants (164) and that he acquired possession of certain tape recordings on September 5, 1956, at the State Bank of Milwaukie (165).

(It was stipulated that an objection on behalf of one defendant goes to both unless it had particular application only to the situation of one defendant (166). Also the defendants renewed their objection on the ground that the evidence had been suppressed by a State court and the Court asked "Don't you think your record is preserved on that point?" (166-167). Over counsel's objection that it called for a conclusion of the witness and was not the best evidence (167), the witness was permitted to answer the question as to the

nature and substance of his observations as to what was on the reels and answered that there were voices of men, the sounds of doorbells that sounded like doorbells, sounds that sounded like telephone bells ringing, sounds that sounded like operators working calls, people answer-telephones (169).

SHERK continued that he did not hear Government's Exhibit 1 until September 6th, that he was positive he saw Government's Exhibit 2 on May 22nd but that he only examined three reels of tape and saw a total of five boxes and he has since learned that one reel was missing at the time he saw the boxes, therefore he could not be sure of what other reels he saw on May 22nd other than Government's Exhibit 2 (177-180); that he placed no marks on either the tape or the box (181) and that it was impossible to tell from looking at the tape whether it contained anything or not (182).

The Government then offered the exhibit (191 as evidence of the corpus delicti (171) and defendants objected (191) and the Court overruled the objection and received the evidence for the purpose of proving the corpus delicti (194). Defendants also objected on the ground of lack of a proper foundation (195). Counsel for defendants pointed out that Exhibit 1 had been identified as the reel, 1-A as the cardboard box, and that the tape had not been offered (196).

Mr. Sherk identified Exhibits 2, 2-B, 2-C, 2-D, 2-E, 2-F and 2-G (212-213). He also testified that it was his observation that it contained the voices of men and

women, operators working a long distance call, the sounds of telephone bells ringing, and buzzing sounds such as made by a telephone bell heard through a telephone line. Defendants objected to the receipt of Exhibit 2 on the same grounds as No. 1 and enumerated then (220-221) and the Court overruled counsel's objections (226).

Sherk identified Exhibits 3 and 3-A and 3-B (238). They were offered in evidence (245), objected to (245-246), objection overruled and admitted the evidence; that the F.B.I. made one copy (264); that he did not know of his own knowledge whether or not other copies had been made (265) but that it would be impossible for him to tell whether the tapes offered were original tapes or copies (265). The Court sustained the Government's objection as to the inquiry as to who was present when the tapes were played before the Federal Grand Jury (260-261-263). The same objections were interposed to Exhibit 4, sub-4, etc. (268), which was overruled (69). Mr. Sherk identified Exhibits 5, 5-A, 5-B and sub-5 (275), and he testified that apparently other F.B.I. agent had access to the tapes (278). The same objections were made and the Court made the same ruling admitting the exhibits (279). Mr. Sherk then identified the slips of paper as being found by him with the reels of tape (Exhibits 1-B, 2-B, 2-D, 2-E, 2-F, 2-G, 3-B, 4-B, and 5-B (288). Goes to page 292 where we start Maloney's testimony.

THOMAS E. MALONEY testified that he lived in the King Tower Apartments in Portland for about three

months—August, September and October of 1955 (Tr. 292, 350, 351). He described the apartment (293); that there was an "outside phone" and that he had previously lived at the Park Plaza in Portland (295); that he had known the defendant Elkins since 1953; that he told Elkins he was going to move into the King Tower (296) in the middle of July; that while in the King Tower Apartment he made and received telephone calls (297); he identified a conversation on the tape as being between him and "Bill" (William) Langley (304); that he did not have knowledge that the conversation was being recorded and that he did not consent to having anyone intercept that conversation nor did he know that it was intercepted (305); nor did he authorize anyone to divulge the contents of the conversation (306). He identified a similar conversation between him and Tommie Sheridan (306). He identified another voice (308) but his answer was stricken (309.

With regard to another conversation, at page 311, he first stated he could not recognize anything about the voice but later stated that he know that the party talking was "me" (311) and that he talked to somebody about fishing at Jamiesen Lake (312) but that he did not recognize the other voice. Over objection, he was permitted to answer the question as to when "the conversation" took place (312-313); that it was made in September of 1955 when he was living at the King Tower (314), and that he did not consent to interception or divulgence (Incidentally, he identified or listened to three conversations on Exhibit I with the

third being stricken, the Jamiesen Lake, Joe E. McLaughlin, conversation was 2-1 and 2 (314-315); was identified as a conversation between the witness and Mr. Langley by telephone from the King Tower with a similar lack of consent to interception, divulgence, and a lack of knowledge (315-316).

The next conversation was identified as being to Mr. Gamrath in Seattle from the King Tower with similar lack of consent and knowledge (318). The witness then did not identify No. 7 (2-7, page 319) but did identify 2-8 as being between himself and Tom A. Sheridan with the call being from the Maloney apartment to the Liquor Commission with similar lack of consent (320). He did not recognize the next one except that he recognized his own voice but he did not recall making such a call and the next one he thought was Joe McLaughlin's voice and he himself, and he "believed he placed the call from the King Tower Apartments with a similar lack of consent (322). With respect to the next one (323), he did not recall the conversation but he recognized the people talking as being the witness and Tommie Sheridan but would not say who placed the call but testified as to similar lack of consent.

At page 324 the witness objected because he stated a record of his boy was being played; the Government directed that it be played and it then appeared that that was not the conversation to which the witness was referring. He could not identify any but his own voice on the call in question. He recognized the next call as between between him and son Ricky (326), with similar

lack of consent and that he never consented to having any one record telephone conversations at his home in Spokane. The witness then identified part of a conversation on the second side of reel 2 by its "Jamisen Lake" content with a similar testimony as to lack of consent and knowledge (330), and identified conversation 3 on this side as being between himself and Tom Sheridan with similar lack of consent and a conversation with the District Attorney, Mr. Langley (332) with similar lack of consent or knowledge (333-334). Exhibit 3 was played and again the conversation was identified as between the witness and Mr. Langley from the witness' apartment with similar lack of consent. The Government then skipped to No. 3 on this side of this reel and again identified Mr. Langley and himself and he identified this conversation by saying that "Joe was taking a shower" (336). The witness then played conversations 4 and 5 which were apparently one conversation and he identified the last part of the conversation as being between him and Sheridan and arranging a meeting (338) with similar lack of consent and knowledge (339). At this point the Court pointed out that there was one count relating to a conversation between Maloney and Sheridan and that three conversations had been identified. The Government contended they would elect as to which one as to the Sheridan count and that the others would be admissible under the conspiracy count. Defendants objected to this (341-342).

On cross-examination the witness testified that he has been employed by race tracks off and on for 18

years except for a couple of years in business, that he has run card rooms, that the Spokane city directory was in error when it listed him as a teamster organizer (349); that he had no connection with the Teamsters except friendship; that he was never employed by them but that he was employed by the District Attorney of Multnomah County with the occupation of "getting addresses of sporting houses and turning them in" (349-350), that he was an investigator but not employed on a regular salary but to receive $100.00 now and $50.00 now and $150.00 now (350) and that he was employed as such investigator during the period of the conversations he had identified; that he did not know whether 502 or 503 was his apartment number at the King Tower; that there was a common wall in the kitchens of Apartments 502 and 503 (353); that his phone number he thinks was Capitol 8-1707 (354), listed under his name but unlisted in the phone book at his request (354); that the telephone was in the living room but had a long cord (355); that the end of the long cord was fastened to the wall in the living room on the west side but that it would reach into any room in the apartment (356); that most of the time the phone was kept in the living room and sometimes in the kitchen and when he was sick, in the bedroom (356-357); that the witness got gout when it rained or got cold (358) and that he thought two or three of the phone calls were made when he had the gout and, if so, they would have been made from the bedroom (357), but he could not remember which calls they were (358) and he had no recollection of which

calls he had made while he was sick (358). When the phone was in the living room it was kept on a desk on the west side of the wall between the living room and kitchen (359); that there were cupboards around the kitchen side of the wall; that he never had offered a duplicate key to Mr. Langley or to anyone else. That the nature of his acquaintance with defendant Elkins between 1953 and 1955 was that he had interceded for Elkins to Mr. John Sweeney to get Elkins' employees into the Teamsters Union (364); that he had met Sweeney at the Long Acres Race Track in Seattle and that at Maloney's intercession Sweeney let Mr. Elkins' men into the Union (365). That the witness then later contacted Mr. Elkins (365) and that he had contacted Elkins after that (365) and that Elkins gave him $200.00 once and that Maloney borrowed $300.00 more from Elkins and still owed it to him (366); that he saw Elkins in '55 in his apartment (367) including the King Tower (368). That he was asked by a lawyer and Elkins to work to help elect Langley (368) but neither could produce Langley so he did not meet Langley (369); that he finally met him by going up to him and telling him that the Teamsters Union was going to support him (Langley) and that Elkins was going to pay Maloney's expenses while Maloney was there (369). That Mr. Langley's father objected to Maloney's helping (369) but that Maloney did work 17 or 18 days helping Langley and the Democratic party (370); that he took Langley to the Longshoremen-Carpenter's & Boilermaker's Union, etc. (370); that he was in business with Elkins during 1955 (372) "with an interest in

licensed card room," that Elkins kept the witness going (372) by giving him money so he could live and eat (373); that the witness thought this was done because the witness had used his influence to get Elkins' employees into the Teamsters Union (373) and that this gratitude continued from 1953 to 1955 (374) and that during 1955 the witness, Elkins, and others were trying to get in the punchboard business including one Mr. McLaughlin, and that the witness tried to get Mr. Mclaughlin interested in buying a "legal card room" for the witness in Kenton (376), that with reference to card games when the witness in the recorded conversation had told Mr. McLaughlin that he had been to "Archer's joint" until 3 o'clock in the morning and stated "he had a poker game" etc. and when the witness then said, "Well are we in on that too?" it was "just crazy conversation, just talking on the phone" (379-380) and that the witness really didn't mean it (380). The witness denied having any understanding with Mr. Elkins and Mr. McLaughlin as to a share in the profits of poker or card games (382) and stated that any monies received by him were received simply as money for him to live off or in payment of an obligation (383). The witness stated that when he called Seattle he was working in his capacity as investigator for the District Attorney (387). That the witness paid over $100 a month for the apartment at the King Towers (390); that he bought a 1950 Chevrolet automobile; that he registered the automobile in his name and gave his address as the Teamsters Hall or the Teamsters Office. The defendants then proposed to play

an exhibit (Defendants' Exhibit 11 and 11-A for identification) to the witness to see if he could identify his voice. This was done out of the presence of the jury and the jury was then recalled and without hearing the recording the witness was asked the question as to identification and stated he could not recognize anyone's voice on the reel (426). The Court sustained counsel's objection as to whether or not the witness had ever authorized Sheriff Schrunk to record his conversation; that the witness checked into the Congress Hotel where his bill was paid by the defendant Elkins (440); that his telephone bill was paid by Joint Council 28 of the Teamsters Union (441), and Mr. John Sweeney is deceased (441); that Mr. Elkins gave Maloney the cash to pay Maloney's bill at the Roosevelt Hotel (441-442); that he received a total of $1200 or $1300 from the District Attorney as salary (443) and that he was paid in check in the first several instances but then in cash (443-444); that his services were closing up houses of prostitution and giving addresses of a couple of bootlegging joints.

That Maloney did not know how many times Langley had come to Maloney's apartment (446), maybe five to eight times and that the witness used to go to Langley's house and that the District Attorney used the witness' apartment once when the witness was gone. That he was not Langley's campaign manager but assisted in the campaign along with other Democrats (447). The Court overruled defendants' request to play Exhibit 11 for identification before the jury, reserving to defendant the right to identify it in its case in

chief. The Court also ruled that the defendants did not have the right to cross-examine the witness Maloney by asking him whether or not he had consented to anyone else other than defendants recording his conversations, making copies of the recordings in question (459-460), and refused to permit counsel to ask him whether or not the witness authorized any third person to divulge any of these conversations unless counsel would "claim that these defendants have authority to that source" (461). At page 465 the Court ruled that counsel would be permitted to ask the witness if he authorized anyone to record or to divulge his testimony. At page 463 the witness stated that he had not identified any voices as Joe McLaughlin but he merely said it "sounded like" his voice and he would not say that Mr. McLaughlin was a party to the conversation. That he returned to Spokane in October of 1955 (474) although he worked for the District Attorney in Portland till December of 1955 (475). That he could not live on $200.00 a month and that his rent at Portland Towers was about $210 or $215; that while he was sitting in his automobile talking to Mr. Elkins some man took a picture of him (Elkins); that the man had a short barrel .38 pistol and that Maloney got out of the car, jumped in his automobile, rode to Forest Grove and three men followed him; that he didn't go to his apartment that night but returned home to Spokane. That Mr. Langley paid his expenses back from Spokane to check some addresses which he did over four or five days and for which he received $150.00 (479). One or two more trips getting addresses for him.

That he never met Clyde Crosby near the King Towers nor was Crosby in his apartment; that Langley came to visit him; that Mr. Sheridan was in his apartment (481); that on the last day of October he saw defendant Elkins with a revolver in his hand; that Elkins laid the revolver alongside the seat and when the unidentified man took Elkins' picture Elkins got out of the car like he was going after the fellow (488, 489); that it was a snub-nosed .38 police revolver. The witness first stated that he did not tell his boss, the District Attorney, about this episode or about seeing Elkins with the gun (490). Then said he might have told him later on (490); then said he did tell Mr. Langley the next time he came down here (491); that the Journal article was 99 per cent correct (494), but was incorrect when it said that Jim Elkins pointed a snub-nosed revolver right at Maloney (494); that he was working for the District Attorney when he had one of the conversations identified by him on direct as being with Tommie Sheridan and told Tommie Sheridan he did not want this witness to come down here from Seattle (498) and when he did not want Mr. Sheridan to talk to the District Attorney, Mr. Langley (499) that this conversation was really just a test for Mr. Sheridan (500); that he didn't want Sheridan to talk to Langley because his conversations with Sheridan were "personal"; that Sheridan was State Liquor Law Administrator (508); that in the conversation when he spoke of the "kid" they were referring to Mr. Langley, the District Attorney (509).

(NOTE: In certain copies of the Transcript, pages 515 and 516 are reversed.)

That he had never complained of his phone being tapped (521).

That he did not on May 18, 1956, give Terry B. Schrunk, then Sheriff of Multnomah County, permission to record his conversation (530-532) nor to Bradley Williams nor Charles Moore (533) nor to Richard Novak (534) nor to Clyde Crosby; that the witness, by using the term "Willy" was referring to Mr. Langley, the District Attorney (537) and that "Crosby" referred to the Representative of the Teamsters Union and "John" referred to John Sweeney, Secretary of the Western Conference of the Teamsters (538); that when he rented the King Tower Apartment he gave the Teamsters Union as a reference and it "was a lie" and that he probably registered at other hotels as a representative of the Teamsters Union; that he did not know who he referred to in Seattle by the name of Tim but he did know a Tim McCulloch in Seattle who was Sheriff of King County; that it was his voice on the tape and he believes he was talking to Mr. Langley when Mr. Langley said "Knock them out in Seattle so they can come down here" but that he had no recollection of such a conversation (546) and that in one of the conversations he had just heard he had called Mr. Langley "kid" to his face. The witness denied that his voice was recorded on Defendants' Exhibit 13, for identification, but that it was his voice on the Government's recording and that his voice was not on the last recording on Exhibit 13 and he did not recognize either of the other voices as belonging to Langley or McLaughlin. The Court refused to take judicial notice

of the transcript of certain recordings present in the stenographic transcript of the Select Committee hearings on Improper Activities in the Labor and Management Field before the United States Senate, Volume XI, on March 14, 1957, narrative content of which was identical with Defendants' Exhibit 13, and after argument adhered to its ruling (564) and in front of the jury the witness stated positively that it was not his voice nor the voice of Mr. Langley nor the voice of Mr. McLaughlin on Defendants' Exhibit 13.

MR. MINIELLY was called (568) over the objection of defendants. The witness stated (573-574) that he had been served with a restraining order restraining him from testifying and also served with a Federal subpoena and over the objection of counsel was ordered to answer the questions (577). He stated that he found the Government's Exhibits 1 to 5 in a large hassock located in the living room at the Clark residence and that at the time they were seized they contained reels of tapes and some longhand notations and identified the subletters of Exhibits 1 to 5, and stated that at the time he seized them he immediately took them to the basement, placed his initials on the back of each box and identified his initials; that he put rubber bands around them, went upstairs, took them out to his prowl car and locked them in his prowl car; that he had a conversation with Mr. Clark about the warrant and that the defendant Clark was asked by the reporter Brad Williams, "Did you make

these tapes for Elkins" and that Clark replied, "Yes, I did and you know it and that's why you're here."

(We observed that BRAD WILLIAMS was not called as a witness to corroborate this.)

and that there was allegedly present, besides Mrs. Clark and another woman known as Jerry Rogers, two uniformed deputies, Garth Stackhouse and Hal Lynn (580, 582); that about two hours later they left; that he carried the tapes to the Court House to the 8th floor and waited for the return of Sheriff Schrunk. When the Sheriff returned, he took the tapes downstairs, turned them over to him, and the Sheriff locked them up in the safe in the affice about 12:30 or 1:00 in the morning (583); that about 3:00 in the morning the Sheriff called about the list of deputy sheriffs which the witness had forgotten to leave at the Court House so the witness got up, got dressed, and returned to the Court House with the list and when he got there there were three or four men present and they were playing the tapes; that one of the men was Sheriff Schrunk; that he next saw the tapes the following Monday and he took them to the District Court before Judge Mears (584) and then he took the tapes to the Grand Jury room and they were played for the Grand Jury (584); then he took them to court the second time (585); then he returned the tapes to Sheriff Schrunk's office and they were locked in the Sheriff's safe; on Tuesday he took the tapes from the District Attorney's office and allowed two F.B.I. agents to look at them; he had the four tapes and five boxes with him as one of the tapes was in the District Attorney's office being untangled

(585); that it took 7 or 8 hours to untangle; that after the District Court hearing he took the tapes to Sheriff Schrunk's office on Judge Mears' orders and they were locked up in the safe of Sheriff Schrunk where they were delivered to Lt. Cross of the State Police; that he was the deputy selected by the Sheriff to organize the raid (591); that there were a total of five deputy sheriffs (595, 596); that he found slot machines in "the farthest corner of the basement" and that he now assumes the basement belonged to 2411 S. E. Main and not 2409 (600); that it was divided by a partition with a door; that at the time of the seizure he thought it was all one unit (601); that there were three reporters and two photographers present (601-602); that Brad Williams followed him up on the porch (602); that the reason he looked in the hassock was because the Journal reporter asked him about it (606); that he presently thought the basement was separated by a wooden partition but in his testimony on the State motion to suppress four days after the raid, he testified it was all one basement, "there is no separation, I had to go through no doors." That he could not tell by looking at the tapes whether there was anything on them; that at the State hearing he did not tell about going o the basement but testified that after removing from the hassock he took them to his car (618); that he never showed the boxes to Mr. Clark nor did he ask Mr. Clark if they were his boxes (625) although he was there two hours; that he did not make the inventory but he signed it the following Monday, the 21st, four days after executing the seizure, and that

the return was not made until May 22nd (631); and that the boxes of tape recordings were the same boxes as Exhibit 23, 24 and 25 (632) and that although he gave a receipt to Mr. Clark for the articles seized in the raid (Exhibit 17), the five boxes of tape (Exhibits 1 to 5, inclusive) were not included on the receipt (634); that the morning after the raid he saw two tape recorders for players in Sheriff Schrunk's office (637); that there was no identifying marks on the tapes themselves or the reels (641); that he next saw them on Monday or Tuesday following the raid when he started to pay them for the F.B.I. and had to interrupt to take them to the Grand Jury (643); that the tapes were not produced until the third and last day of the State hearing on the motion to suppress (646) and that the witness brought them to Judge Mears' court room but he does not recall whether he brought them from the Sheriff's safe or from the District Attorney's Office (646).

That the witness had not called the newspaper men to tell them of the raid (655-656) but that they had knowledge of it because they were waiting at the scene (656); that he had not previously told of the admissions allegedly made by Clark because he had not been asked (652, 654); that at the time of the raid he arrested defendant Clark for possession of slot machines (655) and not for wiretapping (666); that he placed no identification marks on the tapes themselves either by pin pricks or writing on the end of the tape because he was afraid he might damage something (668); that neither the tapes nor the slip of paper containing the list of deputy sheriffs, their shifts and locations, were

mentioned on the receipt. That he took the five boxes of tape and locked it in his car and that he knew of no other keys for his car (674) although there may have been duplicates (675); that he also seized and put on the receipt an amplifier, speaker, preamp, set of head phones and two short lengths of wire; that when Clark came in he wanted to know what was going on and that the witness asked him if he owned the building and its contents—if he owned everything in the building and that the defendant Clark said "I do," and he was then placed under arrest by Minielly (687) for posession of slot machines; that Clark cursed and said something about Langley and his tapes had been found (689); that he made no mention of any oral admission in his report and he explained the mistake in the receipt (692) that the first items was 31 spools of wire records which contained symphony music but had first been listed and 31 spools of tape recording (692); that the list of slot machines were reversed as to stand-up and table-type machines (692); that the slot machines were in the basement under Sonny Martin's house; that there was a door dividing the two basements but that it was open; that he also seized some Castle children's film (693) and that he was positive there was only five boxes of tape recordings although the receipt he gave said six tape recordings but that should have been wire recordings; that he knew the law required him to give a receipt for all property taken (697) but that the matters omitted from the receipt he did not think were important or he forgot about theb (698); that he read the slips of paper inside the

boxes containing tape recordings (699) although he had testified on May 22nd, 1956, five days after the raid, that he just glanced at the notes, he didn't go to the troubles to read them (699). That he didn't know whether he read them the night of the raid or not; that he was having trouble with the newspaper reporters (700, 701); that when he testified on May 22nd, 1956, as to how he happened to look in the hassock he first said "That's my business" (705) and when asked if he had some information he replied he had no information whatsoever on anything (706) and that he said he didn't know how he happened to look in the hassock (706); that the night of the raid they were out of his silght for a short period of time and out of his presence and not under lock and key (712) and that they were put into the safe by the Sheriff; that he next saw the tapes on Monday where he picked them up at the Sheriff's office and took them to the District Attorney's office (716, 717); that the tapes were taken to Mr. Lonergan's office, the Chief Deputy for Mr. Langley (717) and he assumed that copies were being made at the District Attorney's office (718) although they were just playing them in Mr. Lonergan's office (719); that he personally found the Minifon (722) although in testifying on the federal motion to suppress he stated that one of the boys found it (722); that he helped carry the tape recorder and tapes to the District Attorney's office and when he next saw them (724) he got them back from the District Attorney's safe on the second day following or Wednesday (725); that he carried them into Judge Mears' court but one of the

boxes was empty because one had become entangled in the District Attorney's office (725); that the entangled tape was in the District Attorney's office (726) although at the time when he had the empty box before Judge Mears he testified the sack containing the tape was in his (the witness') office (726); that a number of people handled the tapes (732-733) and that when the witness went to the District Attorney's office to get the tapes the day after Judge Mears had ordered them turned over to the Attorney General (735), there was one whole day and night that the tapes were missing (736) and that the following day he looked in the District Attorney's safe and there the tapes were. That he was told by Mr. Lonergan that the tapes were not in the safe (736); that with regard to the handwritten notes he had previously stated he did not believe there was anything about telephone wording on the notes and that he did not know the night he seized the tapes that there was anything in the notes about telephone conversations (747); that the witness was confused when at the time of his testimony before Judge Mears on Wednesday, May 23rd, he state he had seen the tapes no place since delivering the to the Sheriff except in the Sheriff's safe; that the witness was then under indictment by the State Grand Jury and that the defendant Elkins was one of the witnesses called before the Grand Jury (769); that the witness had testified before the McClellan Committee (776) and had just returned therefrom (777); that Government's lettered Exhibits 1-B to 4-B were similar to the ones the witness saw the evening of the raid and that they do contain references to telephone con-

versations (787, 788); that in spite of his contradictory testimony on the point (790-792) he was positive that he saw all of the slips of paper the night of the raid in the basement.

The Mayor and former Sheriff, MR. SCHRUNK, was called, who stated he was under subpoena by the Government and also under a restraining order from the Circuit Court for Multnomah County and the Court advised the witness that the restraining order was a nullity insofar as it purported to interfere or restrain the process of the Federal Court (802) and that if he did not testify it would be necessary to deal with the matter in contempt proceedings (803). The witness' attorney was present, who made the record that the witness had previously been subpoenaed by the defendants (on the motion to suppress, second, that there was a valid Government subpoena served on him, and third, that the federal court had advised him that failure to testify would result in appropriate action by this Court and, fourth, that he was answering on advice of counsel (805).

Terry Schrunk (continued) (808)—That he had a call late in the afternoon of May 17th. That the District Attorney wanted to see him and that at about 6 p.m. the District Attorney brought the search warrant to the Sheriff's office and insisted that it be served forthwith (809). That Minielly called him that evening and he went to the scene of the raid. That his wife was in the car with him since it was their wedding anniversary (811). That he stayed there only ten or fifteen minutes (813). That he went to the Court House

at which time he was handed the five boxes of tape (814). That there was a synopsis of what was allegedly contained on the tapes in each of the boxes (814) and that he, the Sheriff, decided the best thing to do to preserve the evidence was to see that copies were made and stored "in a safe place away from the Court House" (815). That he called the Oregon Journal and asked for technicians to make copies of the tapes; that he gave the tapes to the technician and copies were made and that he watched to make sure he got the original tape back (816). That the witness followed the alleged "synopses" while the tapes were being played the first time (824); that he could not say the synopses and the contents of the tape were identical although he recalled nothing that had been omitted (825). That he gave them to and received them back from Mr. Minielly two or three times (828); that he turned them over to the Attorney General, Mr. Thornton (828); that he turned them over to the Attorney General by reason of the order of Judge Mears (831). That when he turned the originals over to the Attorney General's office he did not turn over any of the copies (835). That at the time he turned them over he knew that the Governor had issued a directive to the Attorney General directing him to take charge of the Grand Jury and investigate the situation in Multnomah County (835). That he did not know that Judge Mears had ordered that any copies that had been made also be turned over to the Attorney General (836). That the copies he made for safe keeping he sent to the vault of the Oregon Journal with the two newspaper reporters (837). That the witness

did not mark the tapes as distinguished from the reel or the box; that the Sheriff's office has a tape recording machine and a wire recording machine (839); that he does not recall asking the technicians whether or not the tapes could be marked (840). That only the Sheriff and one of his former secretaries had the combination to the outside of the safe and that there was a latch-type door on the inside (843-844) and inside the latch-type door was another small compartment under lock and key of which the Sheriff had the only key (844); that he does not recall making any investigation when the tapes were reported missing for about twelve to eighteen hourse (848-849). That he recalls no investigation about it (849-850); that the Sheriff does not recall when he next saw the copies of the tapes (853); that he cannot be positive or specific but he thinks they were brought back to his office by a messenger from the Journal, they were in a large envelope as they were on large reels (854-855); that he thinks they were taken to court (855) and eventually they were destroyed. That the witness cannot remember which court room he took the tapes into (859). That the newspaper reporter, Mr. Williams, was with Mr. Langley when Langley brought the search warrant to Mr. Schrunk (865).

That he remembers there was some discussion about serving the search warrant (866) but he does not recall specifically what was said. He thinks there was probably a discussion about certain obscene material that was supposed to be used bue he recalls no discussion about tape recordings, that he knew that Mr. Clark was

supposed to be either an employee of or representative for Mr. Elkins (868) and that there had been newspaper articles in the Oregonian involving tape recordings (868). That he probably told the newspaper reporter when the warrant would be served (870), that it was "quite usual" to take newspaper men along when executing a search warrant (870). That he was not sure where he met Minielly that evening (874); that he remembers no specific instructions to Minielly (881); that Minielly told him one of the newspaper men was giving him trouble (884); that he was in the Clark house about ten or fifteen minutes (887). That he saw no traffic out around the house but it was reported to him by his wife (887); that there was a partition down the center of the basement and that when he got there the doorway in the petition was open (888-889); that at the time the two telephones, two short lengths of wire and head sets (897-898) were taken by him, he could not say from looking at them whether they were illegal or not or had been used in the commission of the crime (898). That he decided to make copies before he had heard the tapes simply because of the slips of paper he had read (902). That he thought the public was entitled to the facts and his job was to preserve the evidence (902-903). That he did get legal advice about it but it was while the copying was being done (904). That the copying was done on two separate occasions (904). That the Sheriff keeps tax money in the Court House in the safe but that the Sheriff did not feel his own personal safe was secure enough (906).

That on the 8th floor of the Court House is the Criminal Department of the Sheriff's office with a jail which is on 24-hours service (907) but he felt the Oregon Journal was a safer place for the tapes than his office on the 8th floor where there were 24 hour guards (908). That he took no receipt from the Journal for the copies and that he delivered the copies to the two reporters (909). That he does not recall any specific instruction not to make additional copies (910-911). That the Sheriff has learned that additional copies were made (912).

The Court sustained an objection to the question of from whom he got legal advice concerning making of the copies; that he did answer that it was not the District Attorney nor the Attorney General; that the witness first called the FBI on Monday, the 21st (918); that the witness personally destroyed copies by burning them in the fireplace at his home (920). That during the noon hour the witness had refreshed his recollection and the court to which he took the copies was that of Judge Lonergan on September 11th, 1956 (921). That the Minifon in court appeared to be the same Minifon the Sheriff had turned over to the Attorney General (927). That there was a serial number 12271 on the Minifon (928) but that the serial number on the receipt given the Attorney General and given Mr. Clark by Mr. Minielly was for No. 19838. That the witness made no attempt to check the serial number on the machine but thinks there was a mixup in numbers (928-929). That he thinks the Minifon in question was the one turned over but that probably the

wrong number was copied from the receipt. That raids such as this within the city would normally be handled by city police (937); that the Sheriff is the logical one to handle it outside the city limits (937).

That when the tapes were copied they were full and complete copies and not excerpts (942). That Mr. Schrunk did not give Mr. Langley information concerning the contents of the tapes (948). That he never took the copies of the tapes to Judge Mears' court (959-960). That he does not recall whether he personally brought the tapes into Judge Mears' court or not (966). That he knows it was reported that the Minifon belonged to Captain Brown of the Portland Police Department (970) but that he does not know whether or not it did in fact nor does he know who did own the Minifon (970-971).

Defendant objected to holding night session (975).

Witness McColloch, a bank clerk, identified Exhibits 22 sub-letters, 23, 24, as being records signed by the defendant Clark (979-981).

The witness Ennor, a license inspector for the City of Portland, identified Exhibit 25 as being a license application signed for a city license (991).

A Mr. Ross identified Government's Exhibit 26 as being a business record signed in the name Raymond F. Clark (998).

The witness Kelleher identified Exhibit 27 as being an application for employment, signed Raymond F. Clark (1004).

Witness Davis, an F.B.I. agent, qualified as a handwriting expert (1031) and was permitted to testify that in his opinion the script handwriting on Government's Exhibits 4-B, 1-B, 2-G, 2-E, 2-D, 2-C, 2-B, 2-F, 3-B was written by the same individual who wrote the Raymond F. Clark signatures on Exhibits 22-A, 22-B, 22-C, 22-D, 24, 23, 25, 26 and 27 (1032) amplified by his answer on 1034, and Exhibits 25, 26 and 27 were then received in evidence (1035-1036 and 1041).

The enlargements (X, Y & Z exhibits) were identified and shown to the jury and the enlargements were received over objection (1050). The questioned documents read to the jury (1059 to 1063) after counsel had objected to the witness referring to them as the "documents found in the reel" (1055-1058). The witness stated he was not giving an opinion as to whether Exhibits 1 to 5 were original compositions or copied from some other document. The witness looked at defendants' Exhibit 28 and stated that on the back appeared to be written Walter H. Evans, Jr. but that the witness was sure that if he had signed his own initials on the back of the tape he would be able to identify it.

The witness Howlett, a Deputy District Attorney (1089), that the witness received the slips and Exhibits 1 to 5, from Mr. Minielly (1097) and took them to Mr. Langley's office "eventually." That in Mr. Langley's office they searched for the conversation between Mr. Sheridan and Mr. Langley and then found the conversation between Mrs. Anderson and Mr. Langley and

that the witness and Mr. Minielly took the tape machine and the tapes, three boxes, to the Grand Jury (1097). That one of the reels of tape went all over the floor (1098). That the witness Minielly took all but one of the tapes down to the hearing before Judge Mears and that after the hearing in Judge Mears' court the witness and Mr. Lonergan got the tapes from the Grand Jury room and put them in the District Attorney's safe. That he next saw the tapes on Thursday morning when at least the boxes were there. Then he saw them on Friday morning when he got them out of the safe and returned them to Mr. Minielly. That the witness did not mark the tape (1113) nor the reel (1113) but he knows one of the tapes was all tangled up (1114-1115). That at the close of the hearing on Wednesday he went right upstairs and with Howard Lonergan put the tapes in the second shelf of the District Attorney's safe (1118).

That the next morning when he got the Minifon out he saw the boxes there but he did not know whether the tapes were inside (1119) and that he did not see the tapes again until at the time of his testimony. That the conversation that he heard between Dorothea Anderson and Mr. Langley came in loud and clear and he recognized the voices. That when the tape recordings were handed to Judge Mears there were only four recordings and five boxes (1130). The witness identified Government's Exhibit 30 and it was admitted as part of the Government's case against Clark (1136).

The next witness was Mr. Lonergan who was at the time of the raid the criminal deputy for the District

Attorney, Mr. Langley (1148). He had seen and had custody of the tapes during some of the time they were in the District Attorney's office (1161-1164); that on Thursday morning, after Judge Mears' ruling, the witness told Deputy Sheriff Minielly he did not have authority to deliver the evidence to anyone and that Minielly became upset (1167) so the witness opened the safe, looked in, and told Minielly "they're gone, I don't know where they are" but that in fact they were sitting there at the time (1167). That the witness had heard some tapes in Mr. Langley's office of the conversation between Mr. Langley and Mrs. Anderson but that he later learned that what he heard were copies (1177). That when Minielly asked him for the tapes, he, Lonergan, deliberately made a misstatement of fact to him (1187) because he didn't want Minielly to be under responsibility to take some hasty action; that he did it so Minielly could relieve himself of responsibility with the magistrate (1188) by reporting to the Court that the tapes had disappeared which was a deliberate misstatement of fact on Mr. Lonergan's part (1188) and that he felt this was in the performance of his duties as a Deputy District Attorney, a member of the Bar, and an officer of the Court (1188).

The witness Claude Cross, a lieutenant in the State Police (Vol. VIII) that the witness first saw the exhibits when he received them from the Sheriff on May 28, 1956, and he took them to his office in the OLCC Building, and then on the 4th of June engaged a safe deposit box at the State Bank of Milwaukie and that he and Captain Gurdane had the two

keys for the safe deposit box. That they were removed and replaced by him on various occasions and on each occasion were put back in the box and were not altered in any way. That the witness had also heard portions of the exhibits in the presence of Mr. and Mrs. Brad Williams, Mr. and Mrs. Clyde Crosby, a Mr. Douglas Baker, and an unidentified man, at which time Mr. Crosby was making copies or attempting to make copies of the tapes and that this occasion was at the home of Brad Williams (1122-1123) and was in the last of May, 1956, probably the 21st of May and carrying over to the 22nd of May (1124) and that he also had heard what purported to be copies of the tapes on May 19th, 1956, at the Oregon Journal Building.

Captain GURDANE of the Oregon State Police had the other key to the safe deposit box and on August 13, 1956, showed them to Ronald Sherk, an F.B.I. agent. And on September 5th, they were taken by Mr. Sherk (1248). That it was only because of the search warrant that Captain Gurdane permitted Sherk to pick up the exhibits (1250); that he dispatched Lieutenant Cross to Williams' home in response to a telephone call from Brad Williams (1250) and to the Journal Building in response to a call from the Publisher of the Journal (1251).

Mrs. ANDERSON (1255) was a legal stenographer in the District Attorney's office acting as Mr. Langley's secretary. That she saw the slips and heard some of the tapes played in the District Attorney's office on May 22, 1956 (1256-1257). That there were no alterations or tampering with the tapes that she knew of (1263).

Witness DARBY was a state policeman who played the tapes while they were in the custody of the State Police and that there was no alteration or tampering with them while in his possession (1270). That the State Police made a copy of all tapes in its possession (1278). The witness was unable to identify two of the reels (1282) for he could not find the identifying marks on them (1283).

Mrs. ANDERSON, when recalled, stated that she had heard the recordings played in court and recognized Mr. Langley's voice on them and that she had first heard the recordings she recognized in Mr. Langley's office on May 22nd, 1956, and that the other party to the conversation was the witness, and that she recalls having the conversation in its original form and recognized the subject matter of it and that the original conversation took place on the telephone (1287-1288) and that it occurred in 1955 probably in August, that Mr. Langley called her, that she heard it again when it was played during the instant trial and that it was the same conversation; that on either of the occasions when she heard it her voice seemed to be in the background and Mr. Langley's voice was loud and clear; that she never consented to a recording of that conversation being made nor did she give permission to any one to intercept or divulge that conversation (1291) or to use it for their own ends (1292) and that she did not have knowledge that the original conversation was being recorded or intercepted (1292).

LONERGAN was recalled (1296), identified defendants' Exhibit 35, and stated that he took part in the hear-

ing before Judge Lonergan. The Court admitted an indictment against the witness Lonergan which was offered for the sole purpose of showing motive or bias (1300-1325); that the witness had previously heard copies of the tape on the 19th of May, 1956, and not on April 19, 1957 (1238).

Mrs. ANDERSON, recalled that upon reflection the first time she heard the tapes was on the 22nd of May, 1956; that she was requested by Mr. Langley to put the tapes on the machine on Saturday, May 19th, but that she did not stay to hear them. The witness Anderson's husband was a member of the Teamsters Union (1351). The witness was an ex-F.B.I. employee; that the witness typed up the search warrant (1358); that she went to the office the morning of Saturday, the 19th, in response to a specific telephone call to play the recording (1360); that she heard the tapes on a later occasion (1366). That her desk was in Mr. Langley's private office (1370); that she later learned that the recordings she played on the 19th were copies (1384) and that it was on the 19th of May but that she paid no attention to the conversation (1384).

Mr. LANGLEY, the District Attorney, was called as a witness; that he saw the slips of paper (the B. C, D, F and G Exhibits) (2125) the day the matter was presented to the Grand Jury; that Mr. Langley recognized side 1 of tape 1, conversation 1, as being a conversation between him and Mr. Maloney by telephone; that there was no authority given to anyone to record or intercept it; Mr. Langley similarly identified other conversations (Vol. IX). The conversations

were identified by him at pages 1402, 1403, 1405, 1407, 1408, 1410, 1411, 1413, 1414, and further testified (page 1417) that in the last of October or early November 1955 the defendant Elkins came up to the District Atorney's house with a typewritten transcript of some conversations and that one of them (referred to as Reel 2, side 1, conversation 1) was included in the transcript; that the conversation with Elkins was that he handed the transcript to the District Attorney and said he had some tape recordings. The District Attorney said he wasn't interested in hearing them; that Elkins said "Well, it cost him $10,000.00 to get this material" and that the District Attorney said, "Well, don't blackmail me and go on and leave." (1418). He also identified conversation Reel 2, side 1, conversation 13, as being on the transcript shown him by Elkins. The District Attorney then identified the voices of Tom Maloney and Joseph McLaughlin (1421) and that the conversation between Maloney and McLaughlin was on the transcript shown him by Elkins; that the District Attorney first became acquainted with defendant Elkins about 1938 and that Elkins had come to his house in the summer of 1955. Mr. Langley then continued to identify voices (1428) and identified another conversation as being on the "Elkins transcript" (1429).

On cross-examination defendants played Defendants' Exhibit 13 for identification for Langley and he stated he could not identify his voice without knowing the conversation and that it was not his conversation (1434); That he did not hear Maloney's voice nor McLaughlin's voice; the witness then stated he had no independent

recollection of answering certain questions while testifying in Washington, D.C. On the last half of Defendants' Exhibit 13 for identification, the witness stated that he did not have the conversation on the recordings but that he could not answer as to whether or not that was his voice. That the District Attorney had seen Elkins in 1947; that Elkins had never paid him any money; that although a bill of sale to the fixtures of "the China Lantern" had been in Mr. Langley's name, actually Mr. Langley was doing it only as a lawyer and had no benficial interest in it; that the woman for whom he was acting was a Virginia Miller and it was sold to Chinese people; that after looking at the exhibits (Defendants' Exhibit 39) that the lease on the China Lantern was in his name from June 28 to August 12, 1949; that the District Attorney thought Elkins owed him some money but not on a legally enforceable claim for attorney's fee for representing a man named Snyder; that the District Attorney was at Mr. Maloney's apartment on three occasions (1455); that he first met Maloney while attending an annual gathering of the Teamsters Union in Seattle in December of 1954 (1458) while there as a guest of a lawyer who represented the Teamsters (1458); that the Teamsters paid for his hotel room and that he relied partially on Maloney to supply him information concerning the location of houses of prostitution (1460) which, of course, was after he had been elected District Attorney.

And that he paid Maloney a total of about $1200.00 (1460); that Mr. Maloney was in the District Attorney's home numerous times; that he first met Joe McLaugh-

lin in the Portland Towers in March or April of 1955 and that McLaughlin came to the District Attorney's office once or twice and that he was friendly with McLaughlin. That the word "the character" was a nickname for Mr. Elkins (1466); that his only relationship with Mr. McLaughlin was as friend of Maloney and that he absolutely had never received money (more than $5.00) from either Maloney, Elkins or McLaughlin in the presence of any one or more of the others (1468-1469); that he had been to Elkins' office once or twice; that he did not know how long he had known Virginia Miller before he took the lease but that he had known Mr. Butler for maybe six months before that (1472); that he regarded himself as being the lawyer for another lawyer (1445); and that as he recalled Mr. Butler was holding some diamonds as security for the lease transaction; that the District Attorney did not see Mr. Elkins between being in his office in 1949 and Elkins coming to his house in the summer of 1955. That Elkins had the original letters which the District Attorney had written to the Chief of Police (1479); that this call at the District Attorney's house was about five or six in the morning and he believes it was a Sunday; that on Elkins' second visit he came to the door on a Sunday, the District Attorney does not remember the weather (1488) and Mrs. Langley admitted him. The District Attorney was watching a professional football game on television. That Elkins handed him a transcript and said "Read 'em" (1492). That he thinks there were about ten pages and that it took the witness about 20 minutes or a half an

hour to read them (1493). They were single spaced letter size typewritten. That he remembered quite a bit of the conversations that were on the transcript (1494-1497); that there was something about "cutting around the District Attorney" which the District Attorney understood to imply that Maloney was "dealing behind his back" (1497). That after Langley read it, he said "That's a lot of trash" or words to that effect, and that Elkins told him he had the tapes in the car but the District Attorney said he did not want to hear them; that Elkins said it would cost him $10,000 to get the material, and that Langley told him not to try and blackmail him, but Elkins did not directly ask him for $10,000 but that that was the implication the District Attorney put upon it (1501). That he told his wife about it and (from page 1503) "there had been lots of discussions between she and I about Elkins and the difficulties I was having" (1504); that he did not file a complaint against Elkins; that his wife later told him that he (Elkins) had been to see her and that Elkins had played a tape recording for her and that she told the District Attorney the voices sounded like his and that one of the conversations was the one in which the District Attorney was talking to Maloney about some Chinese men. That (1514) when Elkins brought the transcript, Elkins had a snub-nose revolver in the pocket of his jacket; that he pulled it out slightly so he could see it; that he had referred to Elkins as an ex-convict and that it was an offense in the City of Portland for an ex-convict to carry a firearm but that as District Attorney he did nothing about Mr. Elkins'

carrying one; that the District Attorney did suggest that Mr. Elkins be arrested for violation of a traffic ordinance and then be searched in connection with that arrest and then if they found a gun on his person to charge him with being an ex-con in possession of a gun (1517); that the District Attorney had had a narcotics warrant issued against Elkins—a detention warrant (1518) based on narcotic addiction and that he asked the State Police to serve it but he did not ask the Sheriff to serve it although the Sheriff came out with a public statement that he'd be glad to serve it. (1524) Renewed objection about holding court at night.

That before the District Attorney had been elected he had been an Assistant United States Attorney for the District of Oregon; that he had had contact with the F.B.I. and that although he knew that the Elkins transcript contained intercepted telephone conversations of his which he had not consented to and that this constituted a Federal violation, he did not complain to the F.B.I. that Mr. Elkins had brought up to him a transcript of intercepted telephone calls (1530). He did state he had reported generally that his phone had been tapped and that he felt the F.B.I. could not protect his family as that was not their responsibility and that the Oregon State Police didn't want to come in and help straighten up the situation and that the Sheriff's office functions outside the city and that the City Police he thought were controlled by Mr. Elkins (1530-1531). That he did report to the F.B.I. that his telephone had been tapped but he did not name Mr. Elkins as the person he suspected: that the F.B.I. told

him they wanted "some substantial evidence that Mr. —— a particular individual" (1532) had tapped his wires and that the telephone company could find no evidence that the phone had been tapped and that when he told the F.B.I. this "there wasn't any basis from which they could address a communication to their Washington office"; he doesn't know whether he mentioned Elkins' name in connection with the wire tapping or not (1533). That the afternoon of the search warrant the subject was first brought up by Mr. Williams (1537) who told him he had information as to obscene pictures (1537-1538); that they were anxious to get it done that evening (1539-1540) but the witness did not recall whether or not the fact that Friday, Saturday and Sunday were all non-judicial days had anything to do with the decision to get the search warrant Thursday (1541); that Brad Williams first talked to him about 3:30 but that they spent quite awhile on research before calling the Judge to find out whether or not they had sufficient grounds for making an application for a search warrant (1542); that the witness was not sure whether or not an affidavit made on information and belief established probable cause and that the source of his information was the Chief of Police at St. Helens and that he overheard the Chief of Police telling Brad Williams about it on the telephone by listening on the telephone extension (1544); that the source of his information was by eavesdropping the conversation (1548); that after he personally delivered it to Mr. Schrunk and that he doesn't think there were any special instructions or discussion about tape recordings at the time the search warrant was handed to Mr. Schrunk (1553): that he had talked

with Williams about tape recordings but not in connection with Clark; that there was a discussion about a possible connection between Elkins and Clark (1555); that Mr. Williams, the Journal reporter, was the one who had come to him with the information (1556) and that on Saturday probably the Journal brought up the tapes (1560) (on May 19th); that there were five or six reels (1563); that the listening session lasted all day (1567); that the witness does not know whether he was the author of the letter purportedly signed by him and read to the State District Judge on the State motion to suppress proceedings (1578).

That the witness had previously testified that the visit from Elkins occurred in the latter part of October, 1955 (1595); that the witness thinks he told Drew Pearson that the visit was in the last part of October or the first of November and that Drew Pearson stated it was three months after the July 1955 visit and the Court sustained objections to deefndants' questions as to whether or not Mr. Langley had made different answers in Washington, D.C. before the McClellan Committee than those testified to during his direct examination; with respect to Elkins' demand for $10,000 (1604) the matter was presented out of the presence of the jury (1603 to 1607) and a similar objection to the question as to whether or not he had made a different answer to the question as to what conversations he had had with Brad Williams that preceded the search of Ray Clark's home and the same objection to the same question relating to whether or not he had copies of the tapes at the time of Senate hearing (1610).

Langley had consulted Mr. Santoiana of the F.B.I. and told him here were transcripts of Langley's conversation in existence (1612) but doesn't think he used Elkins' name. That he had complained to the telephone company about possible wire taps, that he had secured a photostat of his letter of May 18, 1955 (1615) but that he thinks that it might have been misdated and sent on the 19th rather than on the 18th and he was unable to say whether the letter was based on his personal information or information he received from Mr. Lonergan or some other person but he was still sure that he did not hear the tapes until the 19th of May; that he was under indictment in a case in which Mr. Elkins was a witness appearing against him (Exhibit 46, page 1617); that the tapes he heard on May 19th were the Journal copies (1623) and that he did not hear the original tapes until May 22nd (1620); that the District Attorney put flood lights around his home but that the visit from Elkins was not the sole cause of it (1632-33); that the witness Maloney had worked for him for about from January 1955 to March of 1956 but as far as receiving any compensation it would be from April 1955 to March 1956 and that Langley believed Maloney was in error if he testified he stopped in December 1955 (1634); that the District Attorney paid him a total of about $1200.00 (1635) by check and by cash; that the District Attorney had used Mr. Maloney as an investigator to dig up a key witness in a murder case (1643-1649); that he was not disturbed when he saw the newspaper's story that the tapes were missing from the District Attorney's safe (1655) and that he

never discussed the matter with Mr. Lonergan, his chief criminal deputy; that the witness signed the transfer of the lease to the China Lantern (1658); on further cross examination Langley stated that he recalled the conversation he identified as being between him and his secretary, Dorothea Anderson, and he recalled there was no particular beginning to that conversation; he is not sure where he was located when the conversation was held nor does he know where Dorothea Andeson was except for what Dorothea Anderson stated; that he did recall Dorothea Anderson's laughing in the conversation and he recalled that in the conversation he said "Gosh darn you people" (1668-1669); that by "you people" he meant some others in the office that he had been discussing the problem with; that as District Attorney he operated on a factual basis rather than a personality basis (1671); that if they did not have the facts they would not prosecute and that is the way he felt about Mr. Elkins—nothing personal (1671) and that's why the District Attorney suggested that Elkins be picked up on a traffic charge and then if they found a gun upon him he could be committed to the Oregon State Penitentiary for life in prison (1671) and that after his memory was refreshed he did recall suggesting this to the State officers (1672); that he didn't phone the Deputy Sheriffs when Elkins left his house with a gun in his pocket (1672-1673); that the Deputy Sheriffs didn't have any authority within the city (1673)! When asked what the Deputy Sheriffs were doing executing the search warrant on May 17th in the City of Portland if they had no such authority

he explained (1673) that if the District Attorney had called the Sheriff to complain about Mr. Elkins the Sheriff would have told the District Attorney to call the city police (1673-1674) but that the reason he called the Sheriff to execute the State search warrant was because the matter had been presented to the District Judge (1674) and the witness suggested that counsel for the defendant was pettifogging by asking the District Attorney to explain this answer (1675); the witness listened to some of the conversations on the Government's exhibits and thought he recognized his voice (1683) but did not know where he was phoning from (1685); that Mr. Maloney was not an investigator for Mr. Langley (1692) but that the District Attorney had merely purchased information from him; that in his opinion the conversation between him and Dorothea Anderson was an intercepted telephone communication (1695) but that he did not know where the point of interception was (1695) and that he infers it from the circumstances of the conversation, i.e., where he believes he was and where he thinks she was and the means of transmitting the sound (1696); that he could not understand why there was suddenly no background noise in the middle of his conversation to Mrs. Anderson. Further indictments of the District Attorney were received as evidence of motive or malice (Exhibits 48, 49 and 50) (1705 to 1706), one being an indictment for a conspiracy to commit the felony of hindering and obstructing public justice, another for incompetency, corruption, malfeasance, etc. together with a judgment of conviction for neglecting to prosecute (ORS 167.505) (1725).

The next witness was JOSEPH McLAUGHLIN (1728) who lived at Seattle from June to the end of 1955; that he has two sons—one Joseph and one Patrick; that he has never consented to the interception by ay person of any telephone conversation nor to any telephone conversation being recorded nor to have any other person divulge any contents of a telephone conversation that may have been intercepted and that he had no knowledge that anyone was intercepting any of his telephone conversations; that in 1955 his son Joe was 15; that the witness refused to testify identifying his voice on any of the conversations (1731, 1733, 1734, 1735).

The witness THOMAS SHERIDAN was called, stated that he was at one time the Administrator of the Liquor Commission and that he was acquainted with Mr. Maloney; he identified one of the conversations as being on the exhibits as being between him and Tom Maloney about the middle of September 1955 and that he did not consent to the recording, intercepting, or divulging of it (1746-7). (Conversation 211 the same as to conversation 217, dating it in August or September 1955, the same as to conversation two one ten, 222, and that he recalled conversation 315 and did not give consent to its interception, divulgence or use and had no knowledge thereof, and the same as to a later (from the standpoint of position on the reel) recording which was unidentified).

That there were extension phones in the OLCC office (1767 to 1770) and that they have a conference phone there (i.e. turn a button and receive the con-

versation) (1770). On direct examination the witness explained the telephone arrangements in the Liquor Commission (1766 to 1792); that this witness did not know whether any of his calls had been intercepted (1797-1798) nor did he know that any of them had been divulged or used for anyone's benefit (1805); that the conference phone enabled four or five people to participate in a conversation by talking into it as a microphone (1808) and that the District Attorney never informed him that there had been any interception of his (Sheridan's) calls until around May 22 (1811).

The witness FRANZ was called (1818) and he was vice president of the State Bank of Milwaukie and identified the entry record and explained about the keys to the safe deposit box and that box 912 was rented to the Oregon State Police and that only two men were authorized to enter the box, Claude Cross and Vayne Gurdane (1822) and that Ron Sherk was with Mr. Gurdane on September 5, 1956; that Franz knew that Mr. Sherk was an F.B.I. man and that the witness gave Mr. Sherk no indication that he would not comply with the search warrant (1825).

JACK BUELL was a radio-television technician who was called to the District Attorney's office on May 22, 1956 (1830-31) to untangle and rewind some tape and that it took about four hours and that he handed it to someone when he finished but that he did not remember who (1832). That he was working for KPOJ, affiliated with the Oregon Journal in May 1956 (1935). Mr. Buell testified that he remembered seeing Mr. Brad Williams there (1844); that it is compartively simple to

make copies from tapes and that things can be dubbed in on them or erased (1845) and that under ideal conditions it is hard to tell an original recording from one "dubbed in" (1846), and that although there are electric tests that might show a difference or a copying, the big problem is that you have to be sure you have the original to make any tests (1846, 1847).

MR. NOVAK, the "disc jockey," was called (1849) and testified about going to the court house in the company of Brad Williams election night or early in the morning of May 18th taking a Magnecorder and several boxes of tape; that when he made the copies he played them on one machine and made a single track recording on the other machine (1852 to 1853); that he copied most of them; he thinks he used about eight half-hour reels and that he left with Mr. Williams about 6:30 or 7:00 the next morning; that he thought Mr. Moore, another technician, had made some copies of excerpts the night before (1855) and he also made copies. That he could not tell from looking at the tapes whether they were the same ones or not (1856) as they all looked alike. The witness testified that he thought they were the same tapes because he recognized the label on the reel but it turned out the label he was referring to was the Government's Exhibit mark (1856); that he was directed in his operations of the copying by Mr. Williams and the Sheriff (1859); that he again made some copies of the tapes that afternoon in his studios at KPOJ and they were made from "our own tapes." They were excerpts and he was given these tapes to makes copies at the studios (1861); that after

the copies were made they could have been recorded on a home-type recorder and been recorded on both sides and at the three and three-quarters speed (1864) and it is doubtful if they could be told from the originals (1865). That the tapes can be erased by pushing the recorder button or by holding a strong magnet on the tape while it is being run (1865). That it was the witness' recollection when he heard the tapes that there was background noise present throughout all of the tapes in varying levels (1868); that the witness could not understand how there could be background noise during part of a conversation and no background noise under the balance if it was all one conversation (1869). That the witness made no changes or alterations in any of the conversations (1870) and that if there was a "wiretap on the telephone" you would hear the phone ringing as a buzzing sound rather than a ting-a-ling (1871) unless there was both a microphone in the room and a tap on the telephone (1871).

The witness SHERIDAN listened to defendants' Exhibit 13 (and identified one voice as "similar to Langley's"; he couldn't be positive (1876) and that there was a voice similar to Maloney's on defendants' Exhibit 13 (1876). On re-direct he stated he was not positively able to identify any of the voices but that he was reasonably certain the voice was Langley's (1878).

CHARLES MOORE, a radio technician from KPOJ testified that in the late hours of May 17, he was directed by his station manager to get some recording equipment together and go to the Sheriff's office (1880); that he went by the Journal building and picked up

the night editor, Bob Stein, and then went to the lobby of the County Court House where he met two Journal reporters, Brad Williams and Doug Baker, and they waited for Sheriff Schrunk to arrive (1881); that he then set up his tape recording equipment to make copies of some of the tapes; that the copies he made were single track recordings on 7½ inch reels (1882) and the originals were left in the custody of the Sheriff and that the copies were kiven to the Journal reporters (1882-1883) and that this session ended about 7:30 or 5:45 a.m. (1883); that the copies he made were only excerpts (1883) and that he received his instructions as to what to record from either Brad Williams or Doug Baker; that he did not go back and complete the job of copying and that he made no alterations, additions or subtractions; that he does not recall how many tapes he listened to and copied excerpts from (1892) but his best estimate was three or four or five (1893); that it is possible to make single track tapes and then re-record them making double track tapes from them (1894); that he thinks he ended up with two 7½ inch reels of recordings but he is not exactly sure (1901).

At 1903 the Government offered and the defendant objected to the introduction of Government's Exhibits 1 to 5.

The Court then received the exhibits in evidence (1937) and Mr. Sheridan's testimony concerning defendants' Exhibit 13 was read to the jury.

ROBERT CARTER, the manager of the King

Tower Apartment, was called (1943) and stated that on November 22, 1954, Bernard Kane occupied Apartment 502 and moved out on June 30, 1955. On August 1, 1955, the apartment was occupied by Tom Maloney until October 31, 1955, Apartment 503 was rented to Bernard Kane on August 5th with Kane moving in August 8th and moving out the last of October. The two apartments have entrances alongside each other and are reversed arrangements of each other with a common kitchen wall (1946) with an open way in each between the kitchen and living room. That after an article appeared in the Oregonian in early 1956 he made a search or examination of Apartments 502 and 503 by removing the kitchen cabinets (1947) and he found in the common wall a hole right below the ceiling height about the size of a lead pencil (1947) (1948), and that about three or four feet along the back wall and two and a half feet along the stub wall between the living room and the kitchen there was a hole scooped out in the wall back of the kitchen cabinets about the size of a saucer which sloped down to the size of about of a bottom of a teacup and that on the living room side of this wall in 502 there were about 18 pin holes through the wall paper. The application blank for 503 and for 502 were marked and they were received without objection (1953); that each apartment in the King Tower has its own phone and that Mr. Maloney had his phone—non-listed phone (1955). That there was no switchboard phone in the apartment or rooms (1961) and that there was only one phone in Mr. Maloney's apartment and that the wires from

each phone went down the raceway with most all of the raceways on the outside wall (1961) down to a central terminal block which the phone man had access to and which was locked. That he had no knowledge of Mr. Maloney's phone being tapped at any time during Mr. Maloney's occupancy (1962); that Maloney gave his occupation as an organizer for the Teamsters Union; with one of his references being Clyde Crosby (1963-1964); that the raceway or phone box in the Maloney apartment was located on the window side of the building at the west end (1973) about ten feet from the hole common to the two apartments and about five feet across an opening between the kitchen and living room. The witness drew a diagram of the two apartments (Defendants' Exhibit 57) showing the common wall between the two kitchens and locating the phone raceway on the outside wall (1977); that the hole in the stub wall between the kitchen and living room was about the size of a cup (1978) and that the apartment 502 was furnished with the phone sitting at the breakfast nook table would be within a few feet of the hole in the wall; that the phone had a long cord (1979); that the witness believes the raceway in the wall served an apartment on each floor, i.e. 503, 603, 703 (1980) and the exhibit was explained by the witness and received in evidence (1983); the witness further stated that the large hole in the wall between the witchen and living room was about six feet off the floor (1986); that he had no information as to who made these holes (1986); and that the cupboards were continuous around the wall of the kit-

chen from the back of the large hole to the pencil-size hole between the two apartments (1987) and the witness also admitted that there had been a little disturbance over giving a key to the telephone terminal box in the basement to law enforcement agencies (1987-1988); and that the witness had never seen either of the defendants in King Tower and on re-direct that the law enforcement agency referred to was the Portland Police Department; that since 1955 they will permit no one to go into the box unless he shows his identification card (1992); that the wall between the two apartments is a wire-meshed plastered wall (1993) and that the outside wall is a 9-inch cement wall but with a false wall approximately three inches in with plastered wire mesh (1995); that the witness actually does not know what Government law enforcement or police officers did or did not listen to telephone conversations on the occasion when the key was given to a Portland Police intelligence man (1996).

BERNARD KANE testified he was employed by the defendant Elkins (1998) and that he was a bachelor in November of 1954 and that he rented an apartment uptown at Elkins' request (2000); and that he lived in 502 and Mr. Elkins used it occasionally; that Mr. Elkins was paying for it during this period of time and would use it to rest in and that Mr. Elkins told him that he felt better after about six months (2001) and said that he did not wish to keep the apartment any more but that if Kane wished to pay for it Kane could keep it and that Kane did not think he could afford it so he moved out to his old boarding house (2201); that he filled out

Exhibit 53-A and on August 5th made application for an apartment and that Mr. Elkins asked him if he would get another apartment down town and that the witness believes he asked him if he wanted to be in the same place and that Elkins told him "yes" (2002); and that Elkins said "see, if you can get Apartment 502" and about four or five days later they did tell him he could rent the apartment and that he picked up the key and delivered it to Elkins and never occupied it himself but that Mr. Elkins paid the rent on the apartment (2003); that the witness got married on the 4th of October and left his employment by the Service Machine Company and gave notice on the apartment, returning the keys, which he picked up from defendant Elkins (2005); that the reason he left was to make more money; that Elkins had a home during this same period of time and that he had a telephone when he was in Apartment 502 (2006); that the witness thought he wanted 503 to have a place to meet people and to rest (2007); that he never actually saw Mr. Elkins in 502 but assumed he used it since the witness was gone from early in the morning until late in the evening.

JAMES JENKINS was called as a witness and refused an answer certain questions; that he was not employed by Mr. Elkins at that time nor a month ago nor six months. It appeared that the witness' attorney had been waiting in Court but had temporarily gone at the time the witness was called to the stand (2010-2013) and the Court finally continued the matter until the witness' attorney could be present.

MISS ERICKSON, a public stenographer, was called and testified that she was employed by Mr. Elkins on November 18th, 1956, as a public stenographer (2016). The defendant Elkins objected under the Oregon statute extending privilege (2016-2017). The Court initially sustained defendants' objection (2018) and the witness was excused.

MR. SWANK, supervising special agent with the telephone company, who produced the phone records for Apartment 502, including toll records or long distance calls. That the telephone in apartment 502 at the King Towers was installed August 2nd, 1955, for Tom Maloney and disconnected November 3, 1955 (2027) with the phone number originally AT 4551 and then a change two days later to AT 1707, an unpublished number, and on Labor Day when Portland went to a five digit system, the number was changed to CApitol 8-1707. Mr. Swank read the record of the long distance calls (2029 to 2030) and stated the record indicated one hand set with a 25-foot cord and that each time a tenant changes it means a new instrument, a new telephone (2031) and that it would not be left unless the service man felt the station was in good working order and would serve the new customer (2031-2032); that the record on the original installation indicates a 500-D telephone (2032-2033) which would be one with a volume control on the bell; that the telephone lines do connect to interstate lines through the medium of exchange between states (2034); that when complaints are made about the way a phone works, the complaint is taken down together with the address and

phone number and placed on a line card, and the line card is usually maintained until the number is disconnected and there might be a work order resulting from the line card; that the witness had examined the line card for the Maloney phone (2038) and found no record of any complaints; that the telephone bills were billed to Mr. Maloney, care of the Teamsters Building Association in Portland, Oregon, and that the records indicate they were paid.

On page 2042, the Court called counsel's attention to Rule 26 of the Federal Rules of Criminal Procedure.

The following morning the Government renewed its motion to permit Mrs. Erickson, the public stenographer, to testify and the Court, after argument, held (2051) that this being a criminal case, it was bound by the common law and that there was no privilege between the secretary or scrivener and an employer and that therefore the Government could produce the evidenec. Defendants excepted to such a ruling (2052).

The witness was called for preliminary testimony out of the presence of the jury (2053) to (2115) and then in the presence of the jury and over defendants' objections (2045-2053), (2060), (2065), (2075).

We think a fair summary of Mrs. Erickson's testimony to be that she was handed an affidavit form and made certain changes in it, of which changes she has records in her notes, that after these changes were made there were still further changes made in the affidavits and they were then signed and that the defendants

would not sign them in the form in which her notes indicate, and that she does not recall what the other changes were. Her notes concerning the defendant Elkins' affidavit has reference to the phrase "telephone rings or telephone recordings" (2067) that it was signed and notarized after it was completed (2073).

"Affidavits" (which were carbon copies of unsigned affidavit forms) were marked by the Government 59 and 60. The witness testified she was sure that these exhibits were not typed on her typewriter (2059, 2060); that most of the dictation was made by Mr. Dodd (2066); that after the witness read her notes (2068 to 2072) Government Exhibits 60 and 61 were marked for identification as being the transcript of her notes. The only testimony as to Mr. Elkins' reaction was (2092), "Well, I believe he was just relying on Mr. Dodd's legal advice. I frankly don't know" but that he seemed to be in accord with what was being said (2093). Mrs. Erickson was then recalled in the presence of the jury and her testimony repeated (2115, et seq). The witness' notes indicated that she received dictation to the effect that Clark, working for Elkins, was in charge of "taking tape recordings . . . in apartment 503, King Tower . . . the instruments being located in apartment 503 and recording from a wall tap in the partition between the kitchen and the living room located approximately six feet off the floor in apartment 502 in said apartment building.

That there were certain perforations in the wall that permitted the entry of sound from that apartment which we recorded from day to day, . . ." (2182); and

again that an affidavit form was dictated for Elkins which stated in part (2136), "A note that it is page two of the draft and the words 'inserted telephone rings or telephone recordings'." That there were additional changes made in the documents before either Elkins or Clark signed them (2142). That her impression of the discussion about telephone rings was (2144) "Well, I had the impression that it was a matter of these wall recorders picking up the sound of a telephone ringing over here and the sound would be heard if I were speaking on this end and my voice was being carried to the tape recorder or wall recorder wherever they are . . ." That there was no conversation about telephone taps or interception of telephone communications in her presence (2167).

JAMES JENKINS was called and declined to answer any substantial questions on the ground that his answer might tend to incriminate him (2175-2176).

CLYDE CROSBY was called (2178) who stated he became acquainted with the defendant Elkins in the middle of 1954 and that during 1955 Elkins called on him twice. The first being friendly with the defendant appearing in his capacity as contractor and the second one was in the Fall of 1955 (2179) at which Elkins stated that he had some tapes that were damaging to Teamster officials (2180) and that he brought a recorder in, took them into Crosby's basement, and played them (2180). That he listened for more than two hours (2181) and that he told Crosby that he (Elkins) had paid $10,000.00 to have them burglarized; that his wife

and children were home when the tapes were played (2183); that the tapes were chiefly conversations. The witness Crosby then stated that of the conversations on Government's Exhibits 1 to 5 that he heard (identified by exhibit, side and conversation number) conversations 2-1-1, 2-1-3, and unidentified conversation (2187), 2-1-7, 2-1-9, 2-1-13, 2-1-14, 2-2-1, part of 2-1-14. He did not know as to 2-2-2 (2192-2193). He did recall hearing 2-2-3 (2193). He did not remember 3-1-3 (nor 2-2-2 nor 3-1-1 nor 3-1-3, but he did hear 3-1-5; that he did hear 5-2-1 and that there were two different ones that he heard at his home (2197), one being a conversation between Crosby and Maloney (2197) and that it was a call about Mr. Maloney knew that Crosby was going to call on the Mayor and Maloney asked him to put it off and that he recalled the conversation although he did not recognize his voice.

The Court, over objection (2199), permitted the witness to answer questions concerning a conversation which was not in evidence but which the witness stated he had heard in which he did not recognize his voice but if it was his voice was a telephone conversation (2200). Ruling on 2201.

The witness then volunteered (2201-2202) that there was another conversation relating to John Sweeney which was stricken by the court on page 2203.

On cross-examination the witness testified he was International representative for the Teamsters (2205) and that in 1954 he was Executive Secretary of the General Teamsters local in Portland; that Mr. Sweeney

was first International Representative (Crosby's present job) (2207) and then appointed with the Western Conference of Teamsters (2207). That Mr. Maloney came to Oregon with the idea that he could be of service to the teamsters politically (2209) and as a result of this the witness authorized some expense money for Maloney in recognition of what the Teamsters thought was a service to their organization (2209); that he was not considered an employee; that he learned that Maloney was an undercover man for the District Attorney's office sometime prior to Maloney's leaving Oregon (2210); that the witness did not remember meeting the defendant Elkins at the airport (2212) but that he did remember that Mr. Sweeney and the witness got off an airplane and Mr. Elkins was on the sidewalk talking to Mr. Sweeney (2213); that the men who service pinballs in Seattle and San Francisco are within the Teamsters jurisdiction (2215) but the activity regarding Elkins in the pinball industry took place after the witness Crosby had taken Sweeney's position (2214). That the first time the witness met Joe McLaughlin was in the Teamster Building in Portland (2217); that the witness has known Mr. Langley since 1954 when Langley came to his office and asked for assistance (2217); that the next occasion that he can recall meeting the defendant Elkins was when Elkins appeared at the Teamster Hall to talk about politics (2219) and that he remembers Elkins visiting his home when "the basement work was being done," probably in early 1955 (2220-2221). That he remembers the witness Jenkins (2222) as doing some work (2221 and 2222); that the con-

tract was arranged by the witness Maloney (2222 and 2223); that the witness paid the defendant Elkins nor his company nothing (2224) but that he paid Mr. Maloney for it in cash and did not get a receipt (2224) and that the amount was $200.00 (2225) and that his original arrangement was with Tom Maloney that Tom Maloney would fix up his party room in his basement for $200.00 and that he didn't know who would do it or who did it until later he found it was the defendant Elkins (2225-2226); that he got two slot machines from Malone (2226) and that they were a present and that he did not inquire where Maloney got them; that there was no mention of paying the defendant for them nor any knowledge that they came from defendant (2226-2227); that the witness did not believe he had called Elkins' office or his company to ask them to hurry up on the job (2228); that when Elkins brought the tape recordings it was probably in February or March or possibly early April (2229) and that it was dark (in the evening)—(2229). That the witness stepped out on the porch and talked to Elkins when he rang the doorbell (2229-2230) and that Elkins brought tapes into the house (2231). That he had a clear recollection of what Elkins said (2231) and that it was (2232) that he had some tapes he wanted to play for Crosby and that in Elkins' opinion they were extremely damaging to Teamster leaders (2232); that Elkins got his tape recorder, brought it into the basement, and that it looked like a ladies' suitcase (2233); and that he does not remember the color of it nor the make or name of it (2233); he described the situation

in the play room and the position of the parties (2234, 2235, 2236); that the witness made wire recordings at Brad Williams' home on May 21st and 22nd (2237); that they drank one pot of coffee and possibly more than one (2239) while they listened to the recordings; that Elkins was there two or two and one-half hours (2239, 2240); that Elkins told them the tapes had been stolen from an office (2241) but the witness did not ask which office; that when the recording were played they were played well enough that the witness could identify voice (2243); that his wife probably knew what they were doing (2243); that the witness thought he recognized the voices but did not want to be in the position of identifying them (2244); that the witness thought he recognized the voices the night they were played for him (2246) and he thought he recognized Maloney's without any question of a doubt—he believed he recognized Langley's generally from the characteristic timber and tone (2246); that he thought he heard McLaughlin's voice or a reasonable facsimile and Sheridan's voice (2247); that he was acquainted with Mr. Sheridan at that time ; that he does not recall whether he heard that same conversation (223) relating to Ron Moxness at Mr. Williams' home or not (2247, 2248); that the witness thought he had not identified eleven convercations but maybe about a half a dozen (2255); that on the recordings that Elkins had Mr. Sweeney's voice was recorded (2255); that the most definite date he could give was the Fall of 1955. The Court sustained an objection to the question as to whether or not there was anything the witness heard on the tapes in the

Fall of 1955 that was damaging or incriminating toward Teamster officials (2257).

That the witness thinks Elkins mentioned again the manner in which he obtained the tapes but the witness ignored it and the witness stated that Elkins then said he was "going over my head" (2258).

Crosby testified that he went to Washington on November 2, 1955, and remained there until November 6th (2265). The witness states that when he testified before the McClellan committee in Washington (2268) he stated that "The tapes Mr. Elkins played in my home had absolutely no similarity to those which were played in Mr. Williams' home. They were different types of tapes so far as I can recall. I say different types meaning they were different conversations" but that he did not understand; that he meant there were different conversations he had heard from Elkins that he did not hear in Washington, and that the tapes were of different sizes—on larger reels, and that he may have given the wrong impression but he was upset (2269). That he thinks Elkins had a transcript of certain conversations in his pocket when he visited his home. That the witness further admitted (2274) that when testifying before the Senate Committee he stated that he could no longer recall what he had heard and what he had read (2274) but that the reason was that when he testified he had a bad cold and sinus condition, and the witness again admitted (2275) (2276) that when Senator Mundt asked him if the tapes he heard in his home were the same as those he heard in the home of Mr. Williams, the witness answered "No, sir,

that they were different tapes" and he explained that he was distinguishing between conversations that he could easily recall and that the confusion arose because there were conversations on "Williams' tapes" that were not on the tapes that Mr. Elkins had and they were on different size reels, etc. (2276) and the witness further admitted (2276, 2277) that in answer to another similar question, he stated, "Well, the answer to that, Senator, is that the ones Mr. Elkins played in my home had absolutely no similarity to those that were played in Mr. Williams' home, they were different types of tapes as far as I can recall. I say different tapes meaning they were different conversations." but that he had changed his mind when they were played here in Court (2277); that the witness was then under indictment in the State courts in cases in which Mr. Elkins' name appeared as a witness before the Grand Jury and that he did not know how many indictments there were against him in which Mr. Elkins' name appeared as a witness before the Grand Jury (2282). That they were handing them out like confetti (2283); that he has sued Mr. Elkins (2284) (Exhibit 65), (Exhibit 66, 67, and 68) and that he was suing the defendant Elkins and others for $600,000.00, or more than a million dollars (2288), and counsel for the defendant obtained permission to re-ask a question to which an objection had been sustained (2191, 2192) as to whether or not there was anything on the tapes he heard damaging to Teamster officials and the Court reiterated its former rulings (2292, 2293); that the witness was not able to fix the date of the time he heard the exhibits in the

Williams home (2297); that he was not invited to the Williams home but simply knocked on the door and said he wanted to hear them (2298); that when Elkins came to his house he only had two recordings (2306), i.e. two reels (2306-2307); that the witness recalled one other time when he met Elkins which was in the presence of Sweeney at Amato's (night club) (2315) and that they had lunch with Elkins at a restaurant known as the Prime Rib (2316); that the witness recalls talking to Elkins at least once on the phone relative to Mr. Elkins' sale of the pinball route to Mr. Stan Terry (2320); that he met Mr. Sheridan before the Grand Jury investigation (2322) at the request of a Lieutenant Crisp of the Portland Police Department and that Elkins called him once about the 1954 political campaign; that the witness o.k.'d the telephone bills for Maloney (2326) and that thecharges were paid by either the Teamster Building Association or the Joint Council (2326) (2328); that the witness had no regrets when Maloney left (2332) and that the reason the Teamsters continued to pay Maloney's telephone bills after the 1954 election was over was that Crosby had overlooked cutting it off (2334); that the King Tower Apartment did not check with Crosby before renting Maloney the apartment or he would not have o.k.'d it (2338) but that he was neither an employee nor an official of the Teamsters at the time (2339); that after the informal conference with the Senate Investigating Council in Portland the witness told the auditor they were to pay no more bills of Maloney (2348); that Maloney was helping the Teamsters politically but was not working for the Team-

sters (2351); that the witness traveled on the same airplane with Mr. McLaughlin (2355) and the transportation of both was paid by different Teamster organizations (2356); that the witness had heard McLaughlin speak (2360, 2361), conversation 2-1-9 was played and the witness identified the voices as being those of Maloney and McLaughlin, and the witness stated he was sure it was played by him for Elkins in the Fall of 1955 (2368) and that he was identifying the conversations by their subject matter rather than by the sound of the voices (2373); that the defendant Clark had never played the tapes for him, demanded any money or divulged any contents of the tapes to the witness (2378).

Crosby admitted stating publicly that in April 1956 he did not know Joe McLaughlin when in fact he did know him (2379) but that this was done deliberately to try and learn more "the nature of all this stuff was about" (2379); that the witness had never made a public complaint about Elkins playing any recordings to him or demanding $10,000 prior to Crosby's hearing the tapes at Brad Williams' home (2382) and that the reason he didn't was that his superiors told him to ignore it (2382-2383); and in answer to a question of the Court, the witness stated he was not able to identify what was referred to by Government's Exhibits 1 to 5, inclusive (2388).

JANICE LANGLEY, the wife of the District Attorney, was called and testified that she had seen the defendant Elkins three times at their house. The first time he came to their house when they were bed early

one morning (2392) in late summer 1955 and Mr. Langley answered the door on that occasion. She next saw Mr. Elkins in late October, 1955, and that she fixes that date because (2393) "our youngest child was not born at that time but was going to be" and that on the second time Elkins had some typewritten transcript of some recorded conversations that he brought to show Mr. Langley and that she saw them in her husband's hand in their living room (2393). That the occasion was either a Sunday or a holiday on Elkins' first visit (2394); that on the second visit Elkins was not there over a half an hour (2395) and that he was sitting in the living room; and that she next saw Mr.Elkins the following morning when she was there and the one child who wasn't in school was outside playing (2397); that she answered the door and the defendant Elkins came in, had some tapes on a machine which he plugged in and played; that she asked him to leave but Elkins said taht her husband had not heard these tapes, he didn't want to hear them yesterday, and he played them for me; that a little later on he said that for $10,000 he'd leave those tapes for me, I could have them (2397); that she was getting ready to leave the house when she saw Elkins going out the front door; that the first conversation she heard was one between Mr. Langley and Mr. Maloney (2399), and the second was about Ron Moxness and that she recognized hearing her husband's end of that conversation (2399-2400); that her husband would have been willing to take some action but that "I am the one that put my foot down" (2401); that the occasion of Elkins' first visit was a disturbing

event (2405); that her husband told her Elkins had a gun with him (2404); that it was a Sunday or a holiday, that she could not place it more definitely than the late summer of 1955 (2403 to 2405); that she had previously testified that defendant Elkins' second visit was around the middle of October (2406); that on the occasion of the second visit of defendant she came in while her husband was reading the papers (2414) and she saw some papers in her husband's hand (2415); that she does not know how long the visit lasted (2416); that the witness and her husband discussed the second visit in detail (2419); that Tom Maloney has been a visitor at the Langley home and frequently been there for meals (2420).

That after the second visit he came at 10:00 o'clock the next morning for the third and last visit. That it was a school day (2421). She does not remember the weather. That on one visit he was wearing a gray suit but she is not sure of the other times(2425); that after Elkins walked in he plugged it in and voices started coming out (2428-2430); that her only conversation was she asked him to leave but she doesn't remember when (2430-2431); that Elkins said that for $10,000 he would leave these tapes but those are not his exact words; that his car was parked in front (2432); that the tape recorder was placed on the love seat to play (2432); there was no changing of reels and she does not know whether Elkins put a reel on before he started to play (2434); that she recognized her husband's voice and Mr. Maloney's voice (2435); that she had heard both of the conversations she recognized

from her husband's end of the telephone; that she particularly remembered the Moxness conversation; that after hearing a little bit of the second conversation Mrs. Langley left the room; that she remembers the other conversation bcause it was somone trying to pick up money in his (her husband's) name (2437-2438); that on the first recording she heard was a telephone bell sound; that the sound she heard was a "ting-a-ling-a-ling" rather than a "buzz-buzz" sound (2439); that Elkins paid no attention the first time she asked him to leave (2442) and that she was going to leave when she saw that Elkins had left (2443); that she called her husband and asked him if he would come home for lunch which he did; that her husband did come home for lunch; that the witness never saw a gun on Mr. Elkins (2448) and noticed no bulges in either pocket (2449).

That she thinks Mr. Maloney originated the calls, that she did not have $10,000 at home on that Monday morning (2454).

MALONEY recalled for further cross-examination: That he was asked to come down from Spokane in 1954 to work on behalf of Langley and other men on the Democratic party running for office and that he was asked by Mr. Elkins (2472); that Exhibit 70 looked like his handwriting but he didn't recollect writing that kind of a letter. The return address was his return address and it appeared to be his handwriting but that Exhibits 71 A, B and C, he does not think is his signature and he doesn't remember writing that kind of a letter (2476). The witness then stated

positively he did not write the letter and he wanted to get a handwriting expert (2478) but that as far as Defendants' Exhibit 71-A, he did write PERSONAL but he would not agree that he wrote the letter because there is no date on the letter. That he went fishing with defendant Clark once (2482) in 1955 (in the St. Helen's drinking water reservoir).

End of testimony.

The Government rested (2455). Defendants moved for an acquittal (2458, 2459) and made a motion to elect (2459) and on Count II the Government elected conversation 3-1-3; on Count III the Government contended that since there was only one possible conversation identified, no election was necessary (2461); the number of the Count III conversation was 2-1-1; on Count IV there was only one conversation, 2-1-13 and therefore no election was necessary (2462). Count V the Government elected to rely on conversation 2-1-7. On Count VI, the Government elected 2-2-3; Count VII, the Government elects to rely on 2-1-3 (2464) and on Count VIII with 2-1-14.

On Count IX, the Government contended no election was necessary and the conversation was 5-2-1.

The Government stated that all divulgences were to Langley and Crosby except the one on Count VI to Mrs. Langley.

After argument, the Court withdrew overt Acts I and II from consideration by the jury and withdrew Counts III and IV. All other motions of the defendants were overruled.

The defendant then moved for a mistrial on the ground that the Government had introduced evidence of 18 to 21 conversations, then only some seven were elected. Defendant Clark joined and the Court overruled the motions.

The defendants then rested without putting on evidence and renewed their motions to acquit generally and specifically and they were overruled (2491). The Court commenced instructing at page 2492.

EXHIBIT INDEX—Motion to Suppress

DEFENDANTS' EXHIBITES:	(M.S. Pages) FOR IDEN.	REC'V'D.
1—Photographic copy of Affidavit	40	
2—Photostatic copy of document	95	
3-8—Exhibits Attached to Motion	158	
9—3-page document REPLY TO MOTION OF DEFENDANTS FOR DISMISSAL OF INDICTMENT	160	
10—Copy of subpoena addressed to Ronald E. Sherk	332	
10—Original copy of subpoena to produce documents addressed to Ronald E. Sherk	182	183
11 & 11-A—Photostats of two Entry Cards	273	273
12—Document ANSWER TO MOTION TO SUPPRESS AND RETURN OR DESTROY EVIDENCE	343	349
13—Document REPLY TO MOTION OF DEFENDANTS FOR DISMISSAL OF INDICTMENT	362	367
14—Photostatic copy of document STATE OF OREGON EXECUTIVE DEPARTMENT ORDER	436	438
15—Photostatic copy of 2-page document STATE OF OREGON EXECUTIVE DEP'T ORDER	436	438
16—4-page document MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO QUASH AND MOTIONS TO SUPPRESS	462	

EXHIBIT INDEX (on the Trial)

EXHIBIT INDEX (Cont.)

EXHIBIT INDEX (Cont.)

EXHIBIT INDEX (Cont.)

EXHIBIT INDEX (Cont.)

EXHIBIT INDEX (Cont.)

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